

NORTH CAROLINA  
COURT OF APPEALS  
REPORTS

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OF  
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CASES

ARGUED AND DETERMINED IN THE

**COURT OF APPEALS**  
OF  
NORTH CAROLINA  
AT  
RALEIGH

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ASHLEY v. THE CITY OF LEXINGTON

No. COA10-314

(Filed 4 January 2011)

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PAULETTE MORGAN, MIKE MORGAN, RUFFIN MORGAN, KENNETH D. MOTLEY,  
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MICHELLE O'BRYANT, ANN R. PARKER, TIM PALMER, SHIRLEY PARKS,

## IN THE COURT OF APPEALS

**ASHLEY v. CITY OF LEXINGTON**

[209 N.C. App. 1 (2011)]

STEVEN PARKS, GLENDA PARKS, WATTS B. PARRISH, LARRY KIGER POPE, JR., GAY PLEASANTS, RICHARD G. REESE, BETTY REESE, LEON L. RIVES, II, CATHERINE N. ROBERTSON, RAFAEL ROCA, T. SAINTSING, SANDRA SAINTSING, MARVIN SANDIFER, CAROLE P. SANDIFER, ELSIE SAUL, GLENN A. SCOTT, CYNTHIA S. SCOTT, RICK SMITH, RICK SMITH, GWENNIE SMITH, STEVEN SMITH, LAURA SMITH, VERONICA SROKA, LYNN STEWART, JANE STEWART, JACKIE SHOAF, JERRY SHOAF, CAROL STOTT, DAVID STOTT, TONY TOWNSEND, CAROLYN J. TOWNSEND, WILLIAM F. TUCKER, BETTY S. TUCKER, BRIAN TURLINGTON, JENNIFER TURLINGTON, WILLIE VAUTER, VONCEIL VAUTER, JUNE G. WALDEN, CURTIS JAE WALDEN, KATHY D. WALL, DOUG WALSER, MARY WALSER, GARY G. WIKSTROM, BUSTER B. WILLIS, BRENDA P. WILLIS, BEN WILSON, SHELLY WILSON, WALTER L. WILSON, ED WORKMAN, ANITA WORKMAN, JOE T. YARBROUGH, FAYE YOUNG, LOUISE W. YOUNG, PETITIONERS,

v.

THE CITY OF LEXINGTON, A NORTH CAROLINA MUNICIPALITY, RESPONDENT.

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ELAINE S. ALEXANDER, LINDA BECK, MISTY CLODFELTER, JUDI L. COCHRAN, LOUIS C. COLEMAN, LOUISE S. COLEMAN, RUBY LOUISE CROSS, WILLIAM CROSS, LORETTA CROFTS, SHELL CROFTS, MARTY F. CURRY, GREG D. DYSON, MARK EVANS, JANET EVERHART, LORRAINE H. FURR, LORRAINE H. FURR, RICHARD E. FURR, ROY LEE GATES, BARBARA GATES, GARY GOBBLE, KAREN GOBBLE, GRETA W. HAMM, JOHN CHARLES HAMM, BETTY B. HONBAIER, TERRY HUGHES, ALLISON M. KEENE, CAROLYN LOMAN, THAMAR DARREL LOMAN, HELEN KIVETT, CAROLYN S. McCARN, JOHNNY N. McCARN, LEROY McCARN, RUBY McCARN, DEBORAH MEDLIN, PAUL MEDLIN, CARLTON E. MOBEY, BILLY RAY PLEASANT, HARVEY POTTER, VICTOR SMITH, PAUL R. STOGNER, SARAH STOGNER, VERA F. WALDEN, DORIS R. WALSER, SANDRA H. WALKER, SHIRLEY F. WEAVER, JEFFREY K. WHITE, ELWOOD YOUNTS, NAOMI R. YOUNTS, PETITIONERS,

v.

THE CITY OF LEXINGTON, A NORTH CAROLINA MUNICIPALITY, RESPONDENT.

---

SOY KHOUN, SUSAN LONG, MELIDA SUZY MELGAR, BOBBY D. WALSER, PETITIONERS,

v.

THE CITY OF LEXINGTON, A NORTH CAROLINA MUNICIPALITY, RESPONDENT.

---

**1. Cities and Towns— involuntary annexation—statutory procedure and requirements**

The trial court did not err in an involuntary annexation case by concluding that respondent complied with statutory procedure and the requirements of N.C.G.S. §§ 160A-47(1), 160A-47(3)(b), and 160A-49(a), (b), and (e)(1). The imposition of taxes did not constitute material prejudice. Further, petitioners advanced no compelling argument that any procedural irregularities in the annexation process resulted in material prejudice.

**ASHLEY v. CITY OF LEXINGTON**

[209 N.C. App. 1 (2011)]

**2. Cities and Towns— annexation—sufficiency of metes and bounds descriptions**

The trial court erred by granting summary judgment in favor of petitioners on its claim that the legal description of the annexation area included in the ordinances were not sufficient metes and bounds descriptions as required by N.C.G.S. § 49(e)(1). The tax parcel identification numbers included in the ordinances contained all the information needed to both accurately identify and place the lots and the annexation areas' boundaries on the relevant tax maps and on the ground. Further, the trial court's order failed to show petitioners suffered any material prejudice.

**3. Cities and Towns— annexation—request for extension of sewer service on accelerated basis**

The trial court erred by granting petitioners' motion for summary judgment with respect to the sufficiency of respondent's plan to extend sanitary sewer service to the annexation areas on an accelerated basis to those petitioners who submitted requests. Respondent's actions were consistent with its existing policy which did not require it to pay to extend sewer service to petitioners.

Appeal by Petitioners and Respondent from orders entered 15 December 2009 by Judge Kevin M. Bridges in Superior Court, Davidson County. Heard in the Court of Appeals 15 September 2010. Pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure, these cases were consolidated for hearing as they involve common questions of law.

*The Brough Law Firm, by Robert E. Hornik, Jr., for Petitioners.*

*Parker, Poe, Adams & Bernstein L.L.P., by Anthony Fox, Benjamin Sullivan, and Susan W. Matthews; and Phyllis Penry, for Respondent.*

McGEE, Judge.

This case is before our Court on appeal from a judicial review of three annexation ordinances (the ordinances) by the Superior Court of Davidson County. By agreement of the parties, all three appeals have been combined for hearing. The parties to this appeal are the City of Lexington, North Carolina (Respondent) and certain residents and owners of property located in the three areas Respondent sought to annex (Petitioners). Respondent and

## IN THE COURT OF APPEALS

**ASHLEY v. CITY OF LEXINGTON**

[209 N.C. App. 1 (2011)]

Petitioners appeal orders partially granting and partially denying both parties' motions for summary judgment.

Respondent passed a resolution on 14 April 2008 (the resolution) declaring its intent to annex three areas of land bordering Respondent. These areas are known as the Old Salisbury Road Annexation Area, the East Center Street Annexation Area, and the Biesecker Road Annexation Area (collectively, the annexation areas). The East Center Street Annexation Area includes a land bridge connecting the developed area to be annexed to the city boundary. By statute, the land bridge in the East Center Street Annexation Area cannot exceed twenty-five percent of the total area to be annexed, and must be adjacent on at least sixty percent of its boundary to a combination of the city boundary and the developed portion of the annexation area. All three annexation areas (excluding the land bridge) are developed but lack sewer service. The resolution described the areas to be annexed by metes and bounds descriptions that rely, in part, on thirteen-digit tax identification numbers for certain lots in the area, to locate points on the boundary of the areas to be annexed. The resolution further relied on four maps and stated that the Davidson County Clerk's Office had additional maps and a list of people identified as owning property in the annexation areas. Respondent sent notice of the resolution to every known property owner in the annexation areas and published the resolution and maps twice in the local newspaper.

Respondent adopted a report (the report) on the annexations and made it available to the public on 28 April 2009. Twenty-three maps of the annexation areas were included in the report. The report also included a plan for extending sewer services to the annexation areas. Respondent held a public meeting to explain the report and respond to questions on 3 June 2008. Respondent then held a public hearing on the annexations on 8 July 2008.

Respondent adopted the three ordinances on 21 July 2008. The ordinances contained the same descriptions of the areas to be annexed as those included in the resolution, and also partially relied on the thirteen-digit tax record numbers to help locate the boundaries of the annexation areas. The ordinances were to be effective as of 30 June 2009, but were stayed pending the outcome on appeal.

N.C. Gen. Stat. § 160A-47(3)(c) (2009) provides that, if construction of sewer outfall lines is required, construction must be completed within two years of the effective date of annexation.

**ASHLEY v. CITY OF LEXINGTON**

[209 N.C. App. 1 (2011)]

Secondary lines or extensions—those connecting the main outfall lines to developed property—are to be built “according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions.” N.C.G.S. § 160A-47(3)(b).

According to Respondent’s existing policy, residents may petition Respondent for sewer connection. Should Respondent not have funds available to complete the request, Respondent may either deny the petition or negotiate with the petitioning residents in order to reach an agreement on payment for the connection. Historically, prior to the start of any work on a connection, Respondent has required petitioners to pay a percentage of the connection costs, ranging from fifty percent to one hundred percent of the costs.

For the three newly-annexed areas, Respondent committed to building all secondary lines at Respondent’s expense within five years of annexation. Annexation residents were allowed to petition for accelerated sewer lines but Respondent had no funds budgeted for the costs of accelerated connection. Therefore, Respondent could either deny the request or negotiate connection costs with Petitioners. Respondent provided residents with printed request forms for accelerated sewer requests. The forms required residents to pay fifty percent of the connection costs in advance of construction and within fourteen days of being notified of the costs. If these terms were not met, Respondent would deny the accelerated sewer requests and connections would be established, without cost to residents, within five years of annexation.

A group opposing the annexation, Citizens United Against Forced Annexation, had residents place a sticker on the printed forms that stated: “I agree to the same water/sewer extension policy that is in effect for City residents pursuant to N.C. Gen. Stat. 160A-47(3)(B).” Respondent refused to accept forms bearing the stickers and so notified residents. After being informed of the denial of forms bearing the stickers, a group of residents went to City Hall and removed the stickers. Respondent still refused to accept any form that at one time had a sticker placed on it. Residents who submitted forms with the stickers were provided with new forms and were told they would need to fill out the new forms in order to request accelerated sewer services.

According to the report, by 15 July 2008, Respondent had received “148 valid forms signed by property owners within the annexation areas requesting that residential sewer line extensions be accelerated to be made available within two years of the effective

## IN THE COURT OF APPEALS

**ASHLEY v. CITY OF LEXINGTON**

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date of annexation[.]” Once Respondent received the forms, its Public Works Division calculated the costs of the connection and sent contracts to the property owners. The executed contracts, along with fifty percent of the costs, were to be returned within fourteen days. None of the residents who were notified of the costs sent Respondent an executed contract or payment. Therefore, Respondent did not schedule expedited sewer service connections for any property within the annexation areas.

Petitioners filed three petitions in Davidson County Superior Court seeking judicial review of the ordinances on 15 September 2008. Petitioners challenged the boundary descriptions of the areas to be annexed, alleging that the boundary descriptions were not proper metes and bounds descriptions. Petitioners further argued that Respondent’s requiring fifty percent of payment of the costs of sewer service connections within fourteen days was not part of Respondent’s existing policy regarding extension of sewer lines because this method constituted neither a rejection nor a negotiation.

Both parties moved for summary judgment on 9 November 2009. The trial court entered orders on 15 December 2009, granting: (1) Petitioners’ motion contending that the legal descriptions of the annexation areas included in the ordinances were not sufficient metes and bounds descriptions; (2) Petitioners’ motion contending Respondent’s plan to extend sewer services to the annexation areas was not sufficient; (3) Respondent’s motion contending that the descriptions of the annexation areas included in the resolution, the notices of the public meeting, and the public hearing were sufficient; (4) Respondent’s motion contending that the maps in the report showing the present and proposed boundaries of Respondent and the annexation areas were sufficient; and (5) Respondent’s motion contending that the East Center Annexation Area satisfied the statutory requirements. The orders further stipulated that the ordinances were to be remanded to correct irregularities in the legal description of the land and for correction of Respondent’s plan for accelerated sewer service connections for property owners who submitted proper forms. Respondent and Petitioners appeal.

*Standard of Review*

Within 60 days following the passage of an annexation ordinance under authority of this Part, any person owning property in the annexed territory who shall believe that he will suffer material injury by reason of the failure of the municipal governing board

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to comply with the procedure set forth in this Part or to meet the requirements set forth in G.S. 160A-48 as they apply to his property may file a petition in the superior court of the county in which the municipality is located seeking review of the action of the governing board.

N.C. Gen. Stat. § 160A-50(a) (2009). When a petitioner contests the passage of an annexation ordinance, N.C. Gen. Stat. § 160A-50 (2009) states that:

(f) [] The review shall be conducted by the [trial] court without a jury. The [trial] court may hear oral arguments and receive written briefs, and may take evidence intended to show either

- (1) That the statutory procedure was not followed, or
- (2) That the provisions of G.S. 160A-47 were not met, or
- (3) That the provisions of G.S. 160A-48 have not been met.

(g) The [trial] court may affirm the action of the governing board without change, or it may

(1) Remand the ordinance to the municipal governing board for further proceedings if procedural irregularities are found to have materially prejudiced the substantive rights of any of the petitioners.

(2) Remand the ordinance to the municipal governing board for amendment of the boundaries to conform to the provisions of G.S. 160A-48 if it finds that the provisions of G.S. 160A-48 have not been met; provided, that the [trial] court cannot remand the ordinance to the municipal governing board with directions to add area to the municipality which was not included in the notice of public hearing and not provided for in plans for service.

(3) Remand the report to the municipal governing board for amendment of the plans for providing services to the end that the provisions of G.S. 160A-47 are satisfied.

(4) Declare the ordinance null and void, if the [trial] court finds that the ordinance cannot be corrected by remand as provided in subdivisions (1), (2), or (3) of this subsection.

N.C.G.S. § 160A-50. When reviewing an annexation ordinance:

Our review is limited to the following inquiries: “(1) Did [each] municipality comply with the statutory procedures? (2) If not, will [the opposing party] ‘suffer material injury’ by reason of the

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municipality's failure to comply?" *In re Annexation Ordinance*, 278 N.C. 641, 647, 180 S.E.2d 851, 855 (1971). Where annexation proceedings "show *prima facie* that there has been substantial compliance with the requirements and provisions of the Act, the burden is upon [the opposing party] to show by competent evidence failure on the part of the municipality to comply with the statutory requirements as a matter of fact, or irregularity in proceedings which materially prejudice[s] the substantive rights of [the opposing party]."

*City of Kannapolis v. City of Concord*, 326 N.C. 512, 516, 391 S.E.2d 493, 496 (1990). Our Court has further stated:

The scope of judicial review of an annexation ordinance adopted by the governing board of a municipality is prescribed and defined by statute. . . . These statutes limit the court's inquiry to a determination of whether applicable annexation statutes have been substantially complied with. When the record submitted in superior court by the municipal corporation demonstrates, on its face, substantial compliance with the applicable annexation statutes, then the burden falls on the petitioners to show by competent and substantial evidence that the statutory requirements were in fact not met or that procedural irregularities occurred which materially prejudiced their substantive rights. "In determining the validity of an annexation ordinance, the court's review is limited to the following inquiries: (1) Did the municipality comply with the statutory procedures? (2) If not, will the petitioners suffer material injury thereby? (3) Does the area to be annexed meet the requirements of G.S. 160A-48 . . .?"

*Huyck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 15, 356 S.E.2d 599, 601 (1987) (citations omitted); see also *Norwood v. Village of Sugar Mountain*, 193 N.C. App. 293, 297-98, 667 S.E.2d 524, 527-28 (2008). Our Court has made clear that judicial review of an annexation ordinance is limited by statute:

G.S. 160A-50(f) provides that a court, in reviewing annexation proceedings, may take evidence intended to show either that the statutory procedure set out in G.S. 160A-49 was not followed, or that the provisions of either G.S. 160A-47 or 160A-48 were not met. The statutory procedure outlined in G.S. 160A-49 requires notice of a public hearing and sets out guidelines for the hearing which is to be held prior to annexation. G.S. 160A-47 requires the annexing city to prepare maps and plans for the services to be

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provided to the annexed areas. G.S. 160A-48 sets out guidelines for the character of the area to be annexed.

The North Carolina Supreme Court and the Fourth Circuit Court of Appeals have made it clear that *G.S. 160A-50(f) limits the scope of judicial review to the determination of whether the annexation proceedings substantially comply with the requirements of the statutes referred to in G.S. 160A-50(f).*

*Forsyth Citizens v. City of Winston-Salem*, 67 N.C. App. 164, 165, 312 S.E.2d 517, 518 (1984) (citations omitted) (emphasis added); *see also In re Annexation Ordinance*, 303 N.C. 220, 229-30, 278 S.E.2d 224, 230-31 (1981) (*Annexation Case I*).

The issues in this case were settled by summary judgment.

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” On a motion for summary judgment, “[t]he evidence is to be viewed in the light most favorable to the nonmoving party.” When determining whether the trial court properly ruled on a motion for summary judgment, this court conducts a *de novo* review.

*Brown v. City of Winston-Salem*, 171 N.C. App. 266, 270, 614 S.E.2d 599, 602 (2005) (internal citations omitted).

*Petitioners' Appeal*

[1] Petitioners' arguments on appeal rely on Petitioners' contention that “Respondent did not comply with statutory procedure and did not satisfy the requirements of N.C. Gen. Stat. § 160A-47(1), 160A-47(3)(b), and 160A-49(a), (b) and (e)(1).” Petitioners further argue that Respondent failed to adhere to the requirements of N.C. Gen. Stat. § 160A-48(d). Petitioners argue this Court should reverse certain rulings in the trial court's orders because Respondent violated N.C.G.S. § 160A-50 and Petitioners “have suffered, and will suffer, material injury in that they will be required to pay [Respondent] taxes and will be subject to [Respondent] regulations as a result of the involuntary annexation if it is not overturned.”

Petitioners cite *Nolan v. Village of Marvin*, 360 N.C. 256, 624 S.E.2d 305 (2006), in support of their contention that taxes and regulations alone are sufficient to demonstrate material prejudice. We disagree.

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[T]he holding in *Nolan* was based on the fact that the *only* services proposed to be extended to the area to be annexed were administrative services. The Village of Marvin had no plan to extend police, fire, waste collection or other services to the area to be annexed. Our Supreme Court held that the mere extension of administrative services provided no meaningful benefit to the area to be annexed.

*Pinewild Project Ltd. P'ship v. Village of Pinehurst*, — N.C. App. —, —, 679 S.E.2d 424, 429 (2009) (internal citation omitted). In *Nolan*, our Supreme Court explained: “Those part-time administrative services, such as zoning and tax collection, simply fill needs created by the annexation itself, without conferring significant benefits on the annexed property owners and residents.” *Nolan*, 360 N.C. at 262, 624 S.E.2d at 308-09. It was within this context, where the residents of the area to be annexed would be subjected to taxes without receiving any meaningful benefit, that our Supreme Court found the imposition of taxes to constitute material prejudice. We do not interpret *Nolan* to stand for the proposition that the imposition of taxes will always constitute material prejudice in any involuntary annexation. See *Nolan v. Town of Weddington*, 182 N.C. App. 486, 492, 642 S.E.2d 261, 265 (2007); *Annexation Case I*, 303 N.C. at 233, 278 S.E.2d at 233. Were we to so hold, the requirement that Petitioners demonstrate material prejudice would be rendered meaningless, as every annexation subjects those annexed to the taxes and regulations of the annexing municipality. The taxes the petitioners in *Nolan* would have been subjected to through annexation constituted material prejudice in that case because the petitioners would have received no material benefit in return. In the present case, Petitioners make no such argument, and we do not find *Nolan* controlling in this case. Because Petitioners advance no compelling argument that any procedural irregularities in the annexation process in this case will result in material prejudice, Petitioners fail to meet their burden on this issue. *Kannapolis*, 326 N.C. at 516, 391 S.E.2d at 496. We will, however, consider whether Respondent complied with N.C. Gen. Stat. § 160A-48(d) (2009) because failure to comply with this section could invalidate the annexation for “failure on the part of the municipality to comply with the statutory requirements as a matter of fact[.]” *Kannapolis*, 326 N.C. at 516, 391 S.E.2d at 496.

Petitioners argue that the trial court erred because the size of the land bridge connecting the developed portion of the East Center Street Annexation Area to Respondent exceeded the size allowed by

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N.C.G.S. § 160A-48(d). This argument clearly has no merit. N.C.G.S. § 160A-48(d) states that any required land bridge may not exceed twenty-five percent of the total annexation area. Petitioners contend that the land bridge in the present case “constitutes about 31% of the East Center Street Annexation Area’s [173.50] total acres.” Petitioners’ claim—that the land bridge in question constitutes over twenty-five percent of the total annexation area—appears to originate from selective readings of the report and the ordinances. In a portion of the report labeled “Developed for Urban Purposes” that pertained to certain requirements for land use pursuant to N.C.G.S. § 160A-48(c)(3), Respondent included a breakdown of acres for the developed portion of the East Center Street Annexation Area for the purposes of showing the requirements of N.C.G.S. § 160A-48(c)(3) had been met.<sup>1</sup> In a separate section of the report entitled “Land Bridge,” Respondent explained the requirements of N.C.G.S. § 160A-48(d), including the requirement that the “land bridge connection may not exceed 25% of the total area to be annexed.” In that section, Respondent stated: “Finally, the total area of the land bridge, 51.39 acres is 22.85% of the total 224.89 acres in the East Center Street Area, which is less than the 25% maximum.” The ordinance for the East Center Street Area includes the same information. The 224.89-acre figure is clearly arrived at by adding the 51.39 acres constituting the land bridge to the 173.50 acres constituting the developed area relevant to N.C.G.S. § 160A-48(c)(3). Because 51.39 acres constitutes less than twenty-five percent of 224.89, the total acreage to be annexed, the trial court did not err in granting Respondent’s motion for summary judgment on this issue. Petitioners’ arguments are without merit.

*Respondent’s Appeal*

**[2]** Respondent first argues that the trial court erred in granting summary judgment in favor of Petitioners’ claim that the legal description of the annexation areas included in the ordinances were not sufficient metes and bounds descriptions. We agree. Respondent argues that any failure to adequately describe the area to be annexed

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1. N.C.G.S. § 160A-48(c)(3) requires that the developed portion of an area to be annexed “[i]s so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts three acres or less in size.”

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pursuant to N.C. Gen. Stat. § 49(e)(1) is a procedural error and, therefore, Petitioners must show that they were materially prejudiced thereby. Petitioners argue that our Court has already held that a border description relying on tax parcel identification numbers can be insufficient to meet the description requirement of N.C. Gen. Stat. § 49(e)(1) when the corresponding tax maps were not incorporated into the ordinances by reference. *Blackwell v. City of Reidsville*, 129 N.C. App. 759, 762-63, 502 S.E.2d 371, 374 (1998). We do not find *Blackwell* controlling in this case.

In *Blackwell*, our Court held “that the use of the tax maps, without incorporation by reference, was not a sufficient metes and bounds description.” *Id.* at 763, 502 S.E.2d at 374. In *Blackwell*, there was nothing to indicate that the tax identification numbers contained all the necessary information to identify the relevant tax maps, nor any lot’s position on those maps. The *Blackwell* Court found that “there [was] nothing in the descriptions or maps in the ordinance that identify [the] numbers in any way.” *Id.* at 762, 502 S.E.2d at 374. In the present case, Respondent presented uncontradicted evidence from two licensed surveyors that the tax parcel identification numbers included in the ordinances contained all the information needed to both accurately identify and place the lots and the annexation areas’ boundaries on the relevant tax maps, and on the ground. In an affidavit, licensed surveyor David Craver (Craver) stated the following:

I am personally familiar with how tax maps and other real property records are organized, labeled, and indexed in the Davidson County Register of Deeds and the Davidson County Tax Office. At the Davidson County Tax Office, the parcel ID number assigned to each parcel specifies on which tax map that parcel can be found. For example, if provided the parcel ID number 113500000003, I have enough information to identify and locate the County tax map where that parcel is found and to locate the parcel on that map. If a legal description identifies parcels using Davidson County parcel ID numbers, the parcels can be identified and located.

Craver further stated that the descriptions included in the ordinances were “all valid metes and bounds descriptions[,]” and could “be used to locate the external boundary of that area, both on a survey map and on the ground.”

Licensed surveyor Samuel Leonard (Leonard) executed an affidavit that was in agreement with the statements by Craver as

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quoted above. Leonard further stated that “any person, if provided with a specific parcel ID number, can identify and locate the County tax map where that parcel is found and locate that parcel on that tax map.” Leonard explained:

Each Davidson County parcel is assigned a specific 13-digit parcel ID number which can be used to locate each particular parcel on a Davidson County tax map. The first two digits in the parcel ID number refer to the Davidson County township in which the parcel is located. The next three digits refer to the specific County tax map containing that parcel. The sixth digit in the parcel ID number denotes whether the parcel is located in a platted subdivision. Specifically, a letter in the sixth position means the parcel is in a subdivision; a number means it is not. The next three digits specify the block on the tax map where the parcel can be found, and the final four digits refer to the lot in that block.

Leonard further explained that all this information was available to the public. We hold that the information contained in the Davidson County tax parcel ID numbers specifically identified the location of those parcels on the tax maps and on the ground. The inclusion of these tax parcel ID numbers effectively incorporated the corresponding Davidson County tax maps. The purpose and function of the ID numbers is to locate the parcels on the appropriate maps and these ID numbers contain information from which anyone can locate the corresponding parcels on the appropriate maps. We hold the descriptions provided in the ordinances were sufficient to meet the requirement of N.C.G.S. § 49(e)(1).

We further note that the *Blackwell* Court did not conduct a prejudice analysis in reaching its decision. Our Court has previously held:

Our appellate courts, in reviewing annexation procedures, have consistently held that substantial compliance is all that is required in meeting the boundary requirements set forth in the statutes. We are persuaded that the metes and bounds description and the maps provided a boundary description which could be established on the ground in substantial compliance with the applicable statutes and that [the trial court] erred in [its] findings and conclusions to the contrary.

Additionally, we note that [the trial court’s] order contained no finding or conclusion that the irregularities he saw in the boundary

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description had “materially prejudiced the substantive rights of any of the petitioners.” G.S. 160A-50(g)(1).

*In re Annexation Ordinance*, 62 N.C. App. 588, 598, 303 S.E.2d 380, 385 (1983) (*Annexation Case II*) (internal citations omitted). Our appellate courts have repeatedly required a showing of prejudice even when the statutory requirements of N.C.G.S. § 160A-49 have not been met:

Petitioners have failed to indicate specifically how the metes and bounds description published in the *Asheville Citizen-Times* varied from the metes and bounds description contained in the annexation ordinance and, more importantly, have failed to indicate that this alleged variance prejudiced them in any manner. See *In re Annexation Ordinance (Winston-Salem)*, 303 N.C. 220, 233, 278 S.E.2d 224, 232 (1981).

*Matheson v. City of Asheville*, 102 N.C. App. 156, 171, 402 S.E.2d 140, 148-49 (1991); see also *Sonopress, Inc. v. Town of Weaverville*, 149 N.C. App. 492, 507-08, 562 S.E.2d 32, 40-1 (2002); *In re Durham Annexation Ordinance*, 69 N.C. App. 77, 85, 316 S.E.2d 649, 654-55 (1984); *In re Annexation Ordinance*, 278 N.C. 641, 646-47, 180 S.E.2d 851, 855 (1971) (*Annexation Case III*); *Burnette v. City of Goldsboro*, —, N.C. App. —, 654 S.E.2d 834, 2008 N.C. App. LEXIS 129, 4 (N.C. Ct. App. Jan. 15, 2008), review denied, 362 N.C. 469, 665 S.E.2d 737 (2008); *Hall v. City of Asheville*, — N.C. App. —, 664 S.E.2d 77, 2008 N.C. App. LEXIS 1461, 9-10 (N.C. Ct. App. Aug. 5, 2008), review denied, 363 N.C. 125, 673 S.E.2d 130 (2009).

We note that the trial court’s orders granting summary judgment in favor of Petitioners on this issue included no suggestion that Petitioners had suffered any material prejudice. *Annexation Case II*, 62 N.C. App. at 598, 303 S.E.2d at 385. “We also note that none of the evidence adduced by petitioners at trial would support any such finding or conclusion.” *Id.* at 598, 303 S.E.2d at 386. As we have stated above, the mere fact that Petitioners will be subject to new taxes is insufficient to show prejudice. See *Nolan*, 182 N.C. App. at 492, 642 S.E.2d at 265; *Annexation Case I*, 303 N.C. at 233, 278 S.E.2d at 233. We therefore reverse this portion of the trial court’s orders and remand for further action consistent with our holding.

**[3]** Respondent next argues that the trial court erred in granting Petitioners’ motion for summary judgment with respect to the “sufficiency of Respondent’s plan to extend sanitary sewer service to the

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Annexation Area[s] on an accelerated basis to those Petitioners who submitted requests[.]” We agree.

N.C.G.S. § 160A-47 required Respondent to issue:

(3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:

....

b. Provide for extension of major trunk water mains and sewer outfall lines into the area to be annexed so that when such lines are constructed, property owners in the area to be annexed will be able to secure public water and sewer service, *according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions*. If requested by the owner of an occupied dwelling unit or an operating commercial or industrial property in writing on a form provided by the municipality, which form acknowledges that *such extension or extensions will be made according to the current financial policies of the municipality for making such extensions*, and if such form is received by the city clerk no later than five days after the public hearing, provide for extension of water and sewer lines to the property or to a point on a public street or road right-of-way adjacent to the property *according to the financial policies in effect in such municipality for extending water and sewer lines*. If any such requests are timely made, the municipality shall at the time of adoption of the annexation ordinance amend its report and plan for services to reflect and accommodate such requests, if an amendment is necessary. *In areas where the municipality is required to extend sewer service according to its policies*, but the installation of sewer is not economically feasible due to the unique topography of the area, the municipality shall provide septic system maintenance and repair service until such time as sewer service is provided to properties similarly situated.

c. If extension of major trunk water mains, sewer outfall lines, sewer lines and water lines is necessary, set forth a proposed timetable for construction of such mains, outfalls and lines as soon as possible following the effective date

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of annexation. In any event, the plans shall call for construction to be completed within two years of the effective date of annexation.

- d. Set forth the method under which the municipality plans to finance extension of services into the area to be annexed.

N.C.G.S. § 160A-47 (emphasis added). N.C. Gen. Stat. § 160A-47.1 (2009) mandates that if a municipality required to extend sewer services pursuant to N.C.G.S. § 160A-47 intends to implement any new ordinance or policy

substantially diminishing the financial participation of [that] municipality in the construction of . . . sewer facilities [that] ordinance or policy [must have become] effective at least 180 days prior to the date of adoption by the municipality of the resolution giving notice of intent to consider annexing the area under G.S. 160A-49(a).

In the present case, Respondent did not adopt or implement any new ordinances or policies in the 180 days prior to the adoption of its resolution. At all relevant time periods in this case, Respondent's policy concerning requests for sewer extensions was as follows:

A. All requests for water and/or sewer extensions must be originated by petition of the applicants desiring service. Separate petitions are required for water and sewer, and either may be extended without the other.

B. *Although [Respondent] is dedicated to the concept of making such extensions, [Respondent] shall not be responsible for such extensions if funds are not available. [Respondent] shall be entitled to consider and implement one of the following options.*

1. [Respondent] may deny the petition.
2. [Respondent] may negotiate with the petitioners and reach an agreement satisfactory to both parties.

C. Publicly maintained and dedicated streets or outfall lines within the city limits qualify for water and sewer extensions. Extensions will be made on these streets and outfalls when the petitions are received and approved by the Lexington Utilities Commission and the City Council. Design and cost estimates will be prepared upon receipt of a valid petition and submitted to the Lexington Utilities Commission for review and recommendation.

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Then, *subject to the availability of funds for [Respondent's] cost*, final design will be completed and the extension scheduled for construction. After completion of the extensions, [Respondent] will notify the petitioners that applications for service connection can be made. All participants must pre-pay taps fees and sign billing agreements.

(Emphasis added.)

Respondent argues that because it offered to pay fifty percent of the costs of extending sewer service to any resident on an expedited basis, its offer did not “substantially diminish[] the financial participation” of Respondent, and therefore did not implicate N.C.G.S. § 160A-47.1. According to Respondent, this is because Respondent had never before offered to pay more than fifty percent of the costs of extending sewer service on an expedited basis and therefore Respondent’s financial participation would have been equal to, or greater than, any prior agreement reached for the extension of sewer services in similar circumstances. We do not read the language of N.C.G.S. § 160A-47.1 in relative terms. The plain language of N.C.G.S. § 160A-47.1 requires 180 days notice of *any* new ordinance or policy that diminishes Respondent’s financial participation. We believe any ordinance or policy that reduces Respondent’s financial participation below one hundred percent constitutes a reduction, and would therefore require 180 days notice as mandated in N.C.G.S. § 160A-47.1. However, we do not need to make a holding on this issue because we hold that Respondent’s actions were consistent with its existing policy.

Pursuant to its existing policy, Respondent was not required to pay to extend sewer service to Petitioners. According to Respondent’s policy, “[Respondent] shall be entitled to consider and implement one of the following options[:]” either (1), deny a petition outright, or (2), negotiate a mutually acceptable cost-sharing agreement with any petitioner. Though Respondent’s mass mailing of the form agreement did not invite counteroffers, nothing in the relevant policy indicated that Respondent was required to consider any counteroffers. Respondent’s offer to cover fifty percent of the costs of expedited extension of sewer service to any Petitioner appears to have been the best offer Respondent was willing to extend. There is no evidence that Petitioners tested this assumption by attempting to negotiate a better deal for themselves. However, even assuming Petitioners had made that attempt, the policy in effect allowed Respondent to reject any counteroffer that was not acceptable, just

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as that same policy allowed Petitioners to reject Respondent's offer should Petitioners not find it acceptable, and settle for free connection to Respondent's sewer system within five years rather than sharing the costs and insuring connection within two years. Further, there is nothing in Respondent's policy that would prevent a fourteen-day deadline requirement as part of an agreement Respondent could find acceptable. We hold Respondent's actions were consistent with its existing policy. To the extent the trial court's orders granted summary judgment in favor of Petitioners on this issue, the orders are reversed and remanded to the trial court with direction to enter summary judgment in favor of Respondent on this issue.

Having reviewed the record in this matter, we hold that summary judgment should have been granted in favor of Respondent on all issues brought forward on appeal. We remand to the trial court for further action consistent with this opinion.

Affirmed in part, reversed and remanded in part.

Judges GEER and STROUD concur.

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STATE OF NORTH CAROLINA v. ERIC ALAN OAKES

No. COA09-1280

(Filed 4 January 2011)

**1. Appeal and Error— preservation of issues—failure to argue**

Assignments of error numbered one through four that defendant failed to address in his brief were deemed abandoned under N.C. R. App. P. 28(b)(6).

**2. Criminal Law— prosecutor's arguments—comparing defendant to an animal**

The trial court did not err in a first-degree murder case by failing to intervene *ex mero motu* to address several of the prosecutor's remarks during the State's closing argument. Although comparisons between criminal defendants and animals are disfavored, the use of the analogy in context helped explain the complex legal theory surrounding premeditation and deliberation.

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**3. Witnesses— denial of qualification as expert—use of force science—intent irrelevant**

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion to have a witness qualified as an expert in "use of force science" and to give expert opinions on that subject. Although defendant asserted prejudice in terms of the denial of an opportunity for a witness to obviate intent, defendant's intent to kill was irrelevant to a consideration of felony murder.

**4. Trials— motion to recuse judge—failure to show objective grounds for disqualification**

The trial judge did not err in a first-degree murder case by failing to recuse himself upon defendant's motion. Defendant failed to demonstrate objectively that grounds for disqualification existed.

**5. Appeal and Error— preservation of issues—managing conduct of trial**

It was the trial court's responsibility in a first-degree murder case to initially pass on any concerns it had with the trial, especially since it was in a better position to observe and control the trial proceedings. The trial court should not abdicate its role in managing the conduct of trial to an appellate court.

Appeal by defendant from judgments entered 26 August 2008 by Judge William C. Griffin, Jr. in Hertford County Superior Court. Heard in the Court of Appeals 25 March 2010.

*Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Diane A. Reeves, for the State.*

*Sue Genrich Berry, for defendant-appellant.*

JACKSON, Judge.

Eric Alan Oakes ("defendant") appeals from the 26 August 2008 judgment entered upon a jury's verdict finding him guilty of first-degree murder and sentencing him to life imprisonment without parole in the custody of the North Carolina Department of Correction. For the reasons set forth below, we hold no error.

On or about 6 July 2002, defendant and Joey Forehand ("Forehand"), defendant's friend from the Army, visited a bar in

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Ahoskie, North Carolina. Forehand spoke with a black male at the bar about purchasing ecstasy. Forehand entered the man's vehicle, a yellow Cavalier, and defendant waited in the parking lot. The men drove off, and, when they returned, Forehand told defendant that he had just been robbed by the men from whom he had tried to purchase the ecstasy. Forehand was upset about being robbed, and he and defendant discussed means of getting back Forehand's money. The following week, defendant and Forehand returned to Fort Bragg and purchased a handgun for \$50.00. Defendant stated that it was Forehand's idea to purchase the gun but that he contributed \$20.00 toward its purchase.

On 12 July 2002, the following week, defendant and Forehand returned to Ahoskie and stayed at Forehand's mother's home. On 13 July 2002, Forehand and defendant planned to drive around the Ahoskie area to look for the men who had robbed Forehand or their car. Forehand went to Wal-Mart, and Forehand indicated that one of the men was in the store. Forehand and defendant left the store and waited in Forehand's car in the parking lot.

Forehand and defendant located Tyrell Deshaun Overton ("Overton"), who was shopping with his family on 13 July 2002. Defendant and Forehand, in Forehand's vehicle, followed Overton's van to a restaurant, where Overton's family exited the vehicle, and Overton drove off alone. While both vehicles were stopped at a traffic light, defendant exited Forehand's vehicle and approached Overton's van. Defendant entered the passenger side of Overton's van and "had the gun out, point[ing] it at him the whole time."

When the light turned green, the cars turned onto Memorial drive and entered the parking lot of the Golden Corral. The State produced a statement by defendant, indicating that he and Overton wrestled over the gun before two shots were fired. After the shots had been fired, defendant returned to Forehand's vehicle, and the two drove away. Eye-witness testimony indicated that Overton and defendant both exited the vehicle, Overton ran toward the Golden Corral, and defendant pointed a gun at Overton and fired at him before returning to Forehand's vehicle.

Dr. Paul Spence ("Dr. Spence")<sup>1</sup> performed an autopsy of Overton's body. Dr. Spence noted that Overton had two gunshot wounds. Dr. Spence concluded that one shot entered Overton's chest

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1. Dr. Spence is a specialist and was received as an expert in forensic pathology. At the time of Overton's murder, Dr. Spence was working at the Brody School of Medicine at East Carolina University.

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and another entered Overton's back. Dr. Spence noted that Overton's body had no trace of soot or gunshot residue, which would indicate that the gunshots could not have occurred within two feet of the body. He also noted that he did not have an opportunity to observe Overton's clothing.

Defendant presented testimony from Dr. M.G.F. Gilliland ("Dr. Gilliland"), another medical examiner, at trial. Dr. Gilliland explained that, in her opinion, the distance the gunshot traveled could only be an arbitrary estimation without Overton's clothes. Dr. Gilliland also testified that Overton had scrapes on the knuckles of his right hand, consistent with a struggle over a handgun.

During trial, defendant presented testimony from Dave Cloutier ("Cloutier"). Defendant attempted to have Cloutier classified as an expert witness in the field of "use of force science." However, the prosecutor objected, and the trial court sustained the objection, allowing Cloutier to testify without being qualified as an expert. Cloutier's testimony contained information regarding the amount of time it takes a person to move his body in various directions, the amount of time it takes to pull a trigger once the decision to do so has been made, and the amount of "trigger pull" it typically requires to activate the trigger and hammer on a semi-automatic handgun on an initial and subsequent shot.

On 21 August 2008, the jury returned a unanimous verdict finding defendant guilty of first-degree murder on the bases of (1) attempted robbery with a dangerous weapon, (2) first-degree kidnapping, and (3) premeditation or deliberation. On 26 August 2008, the jury unanimously recommended that defendant be sentenced to life imprisonment without parole. Defendant appeals.

**[1]** Preliminarily, we note that defendant expressly abandons his assignments of error numbered one and four. Accordingly, we need not address these assignments of error. *See N.C. R. App. P. 28(b)(6) (2007)* ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

**[2]** In defendant's second assignment of error, he contends that the trial court committed reversible error by failing to intervene *ex mero motu* to address several of the prosecutor's remarks during the State's closing argument that purportedly violated defendant's rights to due process and a fair trial as secured by the Fifth, Sixth, and

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Fourteenth Amendments to the United States Constitution and Article I, sections 18, 19, 23, 24, and 27 of the North Carolina Constitution. We disagree.

Defendant failed to object to the State's closing argument at trial. As such, our review is limited to "whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Taylor*, 362 N.C. 514, 545, 669 S.E.2d 239, 265 (2008) (quoting *State v. McNeill*, 360 N.C. 231, 244, 624 S.E.2d 329, 338, *cert. denied*, 549 U.S. 960, 166 L. Ed. 2d 281 (2006)). "Under this standard, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *Id.* (citations and internal quotation marks omitted). "To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998). Furthermore, our Supreme Court has explained that,

in order to constitute reversible error, the prosecutor's remarks must be both improper and prejudicial. Improper remarks are those calculated to lead the jury astray. Such comments include references to matters outside the record and statements of personal opinion. Improper remarks may be prejudicial either because of their individual stigma or because of the general tenor of the argument as a whole. . . . Such tactics risk prejudicing a defendant . . . by improperly leading the jury to base its decision not on the evidence relating to the issues submitted, but on misleading characterizations, crafted by counsel, that are intended to undermine reason in favor of visceral appeal.

*State v. Jones*, 355 N.C. 117, 133-34, 558 S.E.2d 97, 107-08 (2002) (internal citation omitted).

In the case *sub judice*, the prosecutor made the following remarks during the State's closing argument, which now are challenged on appeal:

Now [the assistant district attorney] gave you an analogy of the octopus. When I was thinking about this case and what to argue to you in this case, ladies and gentlemen, I thought about two things. One, you watch the Wild Kingdom shows. Ya'll [sic] have

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seen the National Geographic Wild Kingdom shows. And you have these tigers or you have these cheetahs or the black panthers. And I watch them. And I wince when I see the end of it. But I watch those shows because you watch those panthers and you watch those tigers and what do they do? They hunt.

What they do is they will watch their intended victim, which is usually an antelope or pretty little deer [sic] or gazelle. And they will watch it and they will lay [sic] in that high grass. And you watch it and they will lay [sic] there and they will watch every movement of that dear [sic] or that gazelle or that antelope. And then they follow them. And most of the time the antelope or the gazelle will get attacked. Ya'll [sic] have seen those shows. They usually run in packs of four, ten, twenty.

And what the tiger has to do is the tiger has to make a decision. And you can almost see him making the decision, well, I can attack him, I can attack one of the gazelles in the pack. Or what do they normally do, ladies and gentlemen, when you watch that TV show? They normally wait until that gazelle or that deer goes over to a brook and gets something to drink and separates from the pack. And then they go in for the kill. And then that's when you seem them grab them, chew them in half, the blood goes everywhere and everybody cuts the TV off. But that's what they do. That's how they kill things. They hunt them.

Now, ladies and gentlemen, that's exactly what this man did. He hunted Tyrell Overton. . . .

. . . .

Because, ladies and gentlemen, the State contends that if you are sitting [at] a stoplight and somebody gets in your car and points a gun at your head and says you drive, it's just like that thing about the panther and the tiger again.

. . . .

He got him at the stoplight because they saw Tyrell Overton when he dropped his family off. Separated him from the pack. Okay?

. . . .

And the State has proven beyond a reasonable doubt that when you hunt somebody down like an animal and you kill them and you indicate [sic] seven months and when the cops are at your

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friend's house and you slump down in the seat hoping you are not going to get caught, that's first-degree murder. . . .

Both this Court and our Supreme Court have expressed consistent disapproval of improper arguments by the State that appeal not to the evidence or reason, but rather to emotions, a prosecutor's personal opinion or experience, or visceral reaction, including—as here—drawing comparisons between a criminal defendant and members of the animal kingdom. *See, e.g., State v. Roache*, 358 N.C. 243, 297-98, 595 S.E.2d 381, 416 (2004) (explaining that the prosecutor improperly argued that “[defendant and Lippard] packed up like wild dogs—they were *high on the taste of blood and power over their victims*. And just like wild dogs, if you run with the pack you are responsible for the kill[,]” because the argument “improperly [led] the jury to base its decision not on the evidence relating to the issue submitted, but on misleading characterizations, crafted by counsel, that are intended to undermine reason in favor of visceral appeal[,]” but holding that the trial court did not err by failing to intervene *ex mero motu* in view of overwhelming evidence of the defendant's guilt) (citation omitted) (emphasis added) (second and fourth alterations added); *State v. Smith*, 279 N.C. 163, 165-67, 181 S.E.2d 458, 459-61 (1971) (granting a new trial for the trial court's failure to intervene *ex mero motu* after the solicitor had called the defendant a liar, asserted that he knew when to seek a conviction in a capital case and when not to do so, conducted a “tirade” in front of the jury, and characterized the defendant as being “lower than the bone belly of a cur dog” for his alleged transgressions); *Jones*, 355 N.C. at 133-34, 558 S.E.2d at 107-08 (holding that the prosecutor's argument was improper and prejudicial when, during the State's closing argument, the prosecutor referenced the defendant by stating, “‘You got this quitter, this loser, this worthless piece of—who's mean. . . . He's as mean as they come. He's lower than the dirt on a snake's belly[,]’” because the prosecutor purposefully attempted to shift the jury's focus from the jury's opinion of the defendant's character to the prosecutor's opinion, and the prosecutor attempted to steer the jury from its role as fact-finder by appealing to its passions or prejudices); *State v. Brown*, 13 N.C. App. 261, 269-70, 185 S.E.2d 471, 476-77 (1971) (noting the Court's disapproval of the solicitor's referring to the defendant as an “animal,” but explaining that, on the facts in that case, the Court could not hold that the defendant had been prejudiced by the State's characterization), *cert. denied*, 280 N.C. 723, 186 S.E.2d 925 (1972). *But see State v. Bell*, 359 N.C. 1, 19-20, 603

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S.E.2d 93, 107 (2004) (holding that the prosecutor's use of an analogy —comparing the co-defendants to a pack of hyenas who stalk their prey, as may be seen on "those nature shows"—was not abusive and improper when, in context, the analogy helped to explain the complex legal theory of acting in concert with the use of the phrase, "he who hunts with the pack is responsible for the kill"); *accord State v. Goode*, 341 N.C. 513, 546-47, 461 S.E.2d 631, 650-51 (1995) (holding that the prosecutor's statement, "he who runs with the pack is responsible for the kill," was not improper when it explained the legal theory of acting in concert and the argument was supported by the evidence).

Pursuant to the foregoing authority, we hold that, on these facts, the prosecutor's remarks were not improper. The State was pursuing defendant's conviction for the first-degree murder of Overton on the theory that defendant committed the murder with premeditation and deliberation and in the course of an attempted armed robbery and first-degree kidnapping. We reiterate that comparisons between criminal defendants and animals are *strongly* disfavored, but we are convinced by the State's argument on appeal that the use of the analogy, in context, helps to explain the complex legal theory surrounding premeditation and deliberation.

Here, the State presented evidence of a statement written by defendant in which he explained that Forehand had been robbed by several men when Forehand tried to buy drugs. According to defendant's statement, after Forehand was robbed, he and defendant returned home, and, on the following weekend, the two men

went back looking for the male [who had robbed Forehand the previous weekend] so we could get the money back. We saw the male at Wal-Mart so we waited outside for him. When he came out, we followed him until he came to a stoplight. I jumped out and got in the male's vehicle. . . . [H]e tried to take the gun from me. While we were struggling, the gun went off. He then came at me again and I shot him.

The State also introduced a supplement to defendant's written statement in which defendant explained that Forehand first had the idea to get a gun in preparation for their return to Ahoskie and that defendant contributed \$20.00 toward its purchase. Defendant further explained that he and Forehand awoke Saturday morning to look for the men who previously had robbed Forehand. Forehand recognized

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one of the men, Overton, at Wal-Mart, and Forehand and defendant followed Overton from Wal-Mart to a Kentucky Fried Chicken restaurant where Overton dropped off his family. Defendant then detailed how he and Forehand followed Overton to a stoplight at which defendant exited Forehand's vehicle and entered Overton's vehicle, carrying the gun that he had helped to purchase. While in Overton's van, he and defendant struggled; the gun went off, and, when Overton reached for the gun again, defendant shot him a second time.

Accordingly, having reviewed the remainder of the State's closing argument, evidence, and theory of the case to provide the necessary context to review the State's analogy, we hold that the challenged portions of the prosecutor's remarks were not so grossly improper so as to warrant the trial court's intervention *ex mero motu*, and defendant's first assignment of error is overruled.

**[3]** Next, defendant argues that the trial court erred and that he was prejudiced by the court's denial of defendant's motion to have Cloutier qualified as an expert in "use of force science" and to give expert opinions on that subject. We disagree.

North Carolina Rules of Evidence, Rule 702(a) provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2009). Furthermore, North Carolina Rules of Evidence, Rule 104(a) establishes that "[p]reliminary questions concerning the qualification of a person to be a witness . . . shall be determined by the court . . ." N.C. Gen. Stat. § 8C-1, Rule 104(a) (2009). Trial courts are not bound by the rules of evidence when making these determinations. *Id.* It is well established that "trial courts are afforded 'wide latitude of discretion when making a determination about the admissibility of expert testimony.'" *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (quoting *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984)).<sup>2</sup> Similarly, "our trial courts are . . . vested with broad discretion to limit the admissibility of expert testimony as necessitated by the demands of each case." *Id.* at 469, 597 S.E.2d at 692. Accordingly, the trial court's ruling "will not be reversed on appeal

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2. We rely upon *Howerton* because, as noted in a recent Supreme Court dissent, "[t]here is only one evidentiary standard for expert testimony." *State v. Ward*, 364 N.C. 133, 156, 694 S.E.2d 738, 752 (2011) (Newby, J., dissenting).

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absent a showing of abuse of discretion." *Id.* at 458, 597 S.E.2d at 686 (citations omitted).

Additionally, in *Howerton*, our Supreme Court

set forth a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?

*Id.* (citing *State v. Goode*, 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-41 (1995)) (internal citations omitted).

In the case *sub judice*, defendant shot Overton two times. One wound was to Overton's chest; the other was to his back. Defendant sought to have Cloutier admitted as an expert in the use of force to testify with respect to threat assessment and reaction times to demonstrate that "a person can turn his body 90 degrees faster than a person can pull a trigger *once the decision has been made to pull the trigger.*" (Emphasis added). Defendant asserts that "Mr. Cloutier's opinion that the two gunshots in this case would have occurred within the confines of the vehicle and during the course of a struggle went to the heart of the defense in this case." Defendant further asserts that "this view of the evidence points away from the specific intent to kill in premeditated and deliberate murder and the intent elements of attempted robbery with a dangerous weapon and first-degree kidnapping."

Notwithstanding defendant's assertions, in *State v. Bunch*, 363 N.C. 841, 846-47, 689 S.E.2d 866, 870 (2011), our Supreme Court set forth a comprehensive exposition of the felony murder rule in North Carolina:

Felony murder is defined by statute in N.C.G.S. § 14-17,<sup>3</sup> and this Court has confined the offense to "only two elements: (1) the defendant knowingly committed or attempted to commit one of the felonies indicated in N.C.G.S. § 14-7, and (2) a related killing." *State v. Thomas*, 325 N.C. 583, 603, 386 S.E.2d 555, 567 (1989) (citations omitted). Similarly, in *State v. Richardson*, this Court

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3. "'A murder . . . which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree . . .' " *Bunch*, 363 N.C. at 846 n.2, 689 S.E.2d at 870 n.2 (quoting N.C. Gen. Stat. § 14-17 (2007)).

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explained that “the elements necessary to prove felony murder are that [1] the killing took place [2] while the accused was perpetrating or attempting to perpetrate one of the enumerated felonies [in N.C.G.S. § 14-17].” 341 N.C. 658, 666, 462 S.E.2d 492, 498 (1995). Finally, this Court described felony murder in *State v. Jones* as follows: “[1] When a killing is committed [2] in the perpetration of an enumerated felony (arson, rape, etc.) or other felony committed with the use of a deadly weapon, murder in the first-degree is established . . . .” 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000) (citations omitted). Moreover, in *State v. Collins*, this Court commented that “causation . . . must be established in order to sustain a conviction for any form of homicide, either murder or manslaughter.” 334 N.C. 54, 57, 431 S.E.2d 188, 190 (1993); *id.* at 60-61, 431 S.E.2d at 192.

(Original footnote call number modified). Thus, the intent element for felony murder relates to the intent to commit the underlying felonies enumerated in North Carolina General Statutes, section 14-17. *See id. See also State v. Thomas*, 325 N.C. 583, 603, 386 S.E.2d 555, 567 (1989) (“Whether the defendant committed the killing himself, intended that the killing take place, or even knew that a killing might occur is irrelevant. More specifically, a killing during the commission or attempt to commit one of the felonies indicated in the statute is murder in the first-degree without regard to premeditation, deliberation or malice.”) (internal citations omitted) (emphasis added).

Here, the verdict sheet sets forth the jury’s unanimous findings that defendant was “[g]uilty of first-degree murder: [o]n the basis of attempted robbery with a dangerous weapon; [o]n the basis of first-degree kidnapping; *[and]* [o]n the basis of premeditation and deliberation[.]” (Emphasis added). Although defendant attempts to assert prejudice in terms of the denial of an opportunity for a witness to obviate that intent through testimony under the guise of an expert,<sup>4</sup> defendant’s intent to kill is irrelevant to a consideration of felony murder. *See id.* Furthermore, the State’s evidence, including defendant’s statement, plainly sets forth defendant’s intent to commit the felony—attempted robbery with a dangerous weapon—during which the killing occurred. Accordingly, we hold that defendant was

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4. We note that, although the trial court did not allow Cloutier to testify as an expert, Cloutier still presented the testimony defendant sought, albeit under the guise of a lay witness. *But cf. State v. Armstrong*, — N.C. App. —, —, 691 S.E.2d 433, 442-43 (2010); *id.* at —, 691 S.E.2d at 447 (holding no prejudicial error upon review of the defendant’s argument that he was prejudiced by, *inter alia*, the State’s use of “expert opinion masquerading as lay testimony”).

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not prejudiced by the trial court's denial of defendant's motion that Cloutier be received as an expert witness in the use of force in the case *sub judice*.

**[4]** In defendant's third argument on appeal, defendant contends that the trial judge erred by not recusing himself upon defendant's motion. We disagree.

In relevant part, North Carolina General Statutes, section 15A-1223 provides that

[a] judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is . . . [p]rejudiced against the moving party or in favor of the adverse party . . .

N.C. Gen. Stat. § 15A-1223(b)(1) (2009). The North Carolina Code of Judicial Conduct requires that,

[o]n motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where . . . [t]he judge has a personal bias or prejudice concerning a party.

Code of Judicial Conduct Canon 3(C), 2010 Ann. R. N.C. 518-19.<sup>5</sup>

A judge's impartiality also implicates both federal and state constitutional due process principles. *See, e.g., Tumey v. Ohio*, 273 U.S. 510, 523, 71 L. Ed. 749, 754 (1927) (explaining that the Fourteenth Amendment's due process guarantee would have been violated if an impartial judge had not presided over the case); *State v. Miller*, 288 N.C. 582, 598, 220 S.E.2d 326, 337 (1975) ("The substantive and procedural due process requirements of the Fourteenth Amendment mandate that every person charged with a crime has an absolute right to a fair trial before an impartial judge and an unprejudiced jury.").

We previously have explained that,

[w]hen a party requests such a recusal by the trial court, the party must demonstrate objectively that grounds for disqualification actually exist. The requesting party has the burden of showing through substantial evidence that the judge has such a personal bias, prejudice or interest that he would be unable

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5. Canon 3 was amended last in 2006. Therefore, the 2010 version of the North Carolina Code of Judicial Conduct reflects the same principles that were applicable during the proceedings at issue here.

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to rule impartially. If there is sufficient force to the allegations contained in a recusal motion to proceed to find facts, or if a reasonable man knowing all of the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner, the trial judge should either recuse himself or refer the recusal motion to another judge.

*In re Faircloth*, 153 N.C. App. 565, 570, 571 S.E.2d 65, 69 (2002) (internal citations and quotation marks omitted).

Our Supreme Court has qualified the foregoing by noting that the bases for disqualification set forth in North Carolina General Statutes, section 15A-1223 are not exclusive, and that resorting solely to section 15A-1223 does not end the proper inquiry. *State v. Fie*, 320 N.C. 626, 628, 359 S.E.2d 774, 775 (1987). Furthermore,

[i]t is not enough for a judge to be just in his judgment; he should strive to make the parties and the community feel that he is just; he owes this to himself, to the law and to the position he holds. . . . The purity and integrity of the judicial process ought to be protected against any taint of suspicion to the end that the public and litigants may have the highest confidence in the integrity and fairness of the courts.

*Id.* at 628, 359 S.E.2d at 775-76 (internal citations and quotation marks omitted).

We have held that a defendant was deprived of a fair and impartial trial when the judge's words and actions "set a tone of fear at the trial," and "created an impermissibly chilling effect" that likely affected the defendant's counsel's ability to examine witnesses. *See State v. Wright*, 172 N.C. App. 464, 468-71, 616 S.E.2d 366, 369-70, *aff'd*, 360 N.C. 80, 621 S.E.2d 874 (2005) (per curiam). However, not every instance of a judge's impatience, "acerbic" remarks, or failure to demonstrate "a model of temperateness," when viewed in the totality of circumstances, deprives a defendant of a fair trial. *See State v. Fuller*, 179 N.C. App. 61, 69-70, 632 S.E.2d 509, 514-15, *appeal dismissed*, 360 N.C. 651, 637 S.E.2d 180 (2006) (distinguishing *Wright*). Cf. *Liteky v. United States*, 510 U.S. 540, 555-56, 127 L. Ed. 2d 474, 491 (1994) ("Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even

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a stern and short-tempered judge’s ordinary efforts at courtroom administration—remain immune.”) (emphasis in original).

In the case *sub judice*, after thorough review of the parties’ appellate briefs, the parties’ oral arguments, and relevant portions of the voluminous transcripts created during defendant’s trial and pre-trial motions’ hearings, we are convinced that defendant has failed to “demonstrate objectively that grounds for disqualification actually exist.” *In re Faircloth*, 153 N.C. App. at 570, 571 S.E.2d at 69 (citation and quotation marks omitted). Defendant bases his argument on appeal on four grounds: (1) excerpts from a pretrial motions hearing conducted on 11 September 2007, (2) excerpts from a pretrial motions hearing conducted on 4 February 2008, (3) excerpts from a *voir dire* hearing on defendant’s trial counsel’s motion to recuse on 11 August 2008, and (4) an assertion that “the trial court was often dismissive of defense counsel’s efforts and made a number of rulings unfavorable to the Defendant.”

Initially, with respect to defendant’s assertion that the trial court often was dismissive of counsel’s efforts and that the court made rulings against defendant, we note that defendant fails to support this sweeping assertion with specific examples of impropriety at trial or the “efforts” of which the court was “dismissive.” We also note that even the most optimistic advocate could not reasonably expect to advance through a trial such as this without some rulings being made against his party’s interests. Without more argument or support, this contention is without merit.

With respect to 11 September 2007, defendant’s trial counsel sought to have the District Attorney and her staff disqualified from trying the case on the theory that the District Attorney might be needed as a defense witness. The judge stated that

I don’t have any doubt at this point, Mr. Sutton, that that’s exactly what you are doing is laying the groundwork to try to put error in the case. I mean, that’s exactly what’s going on here. I’ve been listening to it for an hour. I think I understand what’s going on here.

However, the court already had determined that the potential danger envisioned by defendant’s trial counsel—having the District Attorney testify as a witness for the defense—would not occur because she would not be able to testify as to inadmissible information concerning plea negotiations. The foregoing statement from the trial judge is the harshest cited by defendant, and it wholly fails to meet

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the objective criteria required for recusal. Defendant's remaining concerns from the 11 September 2007 hearing similarly fail when read in context.

With respect to the 4 February 2008 hearing, defendant argues that the following colloquy demonstrates the trial judge's bias:

THE COURT: Let me make one inquiry. I was told when we quit for lunch ya'll [sic] had arrived at some trial date agreement. Is that correct?

[PROSECUTOR]: Yes, sir, the State has, Judge. We have talked about the different dates that both sides wanted to take into account all the different things that have happened, Judge. I think everybody has agreed—I'm not going to speak for ya'll [sic]—but August 11. . . .

. . . .

THE COURT: Of course you know the Court's feeling is that the case needs to be tried more quickly than that, however, if everybody is committed to getting the case tried at that time I'll bite my tongue and let you schedule it. . . .

[DEFENSE COUNSEL]: Your Honor, I think you can see what we have done to try to get records. We are trying as hard as we can. And his previous lawyer got disbarred and we have never been able to talk to her. We are doing our level best we can, Judge.

. . . .

[PROSECUTOR]: Judge, if I could, this date was agreed upon. I don't think that anybody has said that was the date that agreed upon, the defendant. And we went back and forth on dates now.

. . . .

[DEFENSE COUNSEL]: But we didn't ask for that. We asked for 15 months.

THE COURT: I don't care how much you asked for.

[DEFENSE COUNSEL]: Then why are you asking us if we agreed? . . .

THE COURT: . . . It's [been] five and a half years. The public and your client need this case resolved. The bar and this State ought to be ashamed that we can't get cases tried more quickly than this and do a good job.

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[DEFENSE COUNSEL]: Your Honor, why does the Court feel it necessary —

THE COURT: Mr. Sutton, don't start. Step out and talk to Mr. Warmack and Mr. Dixon.

[DEFENSE COUNSEL]: Your Honor, I object to the Court's comments on the record about the bar ought to be embarrassed.

THE COURT: Mr. Sutton, step out of the courtroom.

[DEFENSE COUNSEL]: I can't leave until the hearing is over.

THE COURT: It's over.

[DEFENSE COUNSEL]: Thank you, Your Honor.

THE COURT: Mr. Sutton, I don't know who's going to be here to try this case in August but if I'm here I want you to know that I will not tolerate your talking back to the Court and arguing to the Court. I will not tolerate it.

[DEFENSE COUNSEL]: Then I would ask that you not hear it.

THE COURT: Step out.

With respect to the judge's statement that "[t]he bar and this State ought to be ashamed that we can't get cases tried more quickly than this and do a good job[,]” we note that it was not directed for or against a particular party or position. Rather, the court admonished the attorneys generally in view of the fact that more than five and one-half years had elapsed between defendant's indictment and his trial notwithstanding the fact that defendant's prior counsel had been disbarred—one reason for a portion of the delay. The remainder of the judge's admonishment to defendant's trial counsel—namely that the judge would “not tolerate . . . talking back to the Court and . . . arguing to the Court”—does not impart an objective bias or partiality. It does, however, reflect a call to order and anticipate a trial with appropriate professional decorum. A review of the record at trial, however, demonstrates that the court's admonishment did not “create[] an impermissibly chilling effect on the trial process.” *Wright*, 172 N.C. App. at 471, 616 S.E.2d at 370.

With respect to the 11 August 2008 hearing, the court heard and considered defendant's evidence, including, *inter alia*, defendant's concerns with respect to the 11 September 2007 and 4 February 2008 hearings discussed *supra*. The court also considered defendant's trial

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counsel's statements relating to a prior case—distinct from the one at issue—during which, counsel asserts, he temporarily was hospitalized for gastrointestinal pains notwithstanding having a trial calendared that day with the same judge presiding over the case *sub judice*. Counsel asserted that the judge called and inquired with counsel's doctor about counsel's medical treatment and accused counsel of "malingering." These prior incidents, defendant argues, demonstrate the trial judge's bias against defendant's trial counsel. Upon review of the record of the case *sub judice*, defendant fails to demonstrate that any prior interactions between the trial judge and his trial counsel in any way affected his trial. Our review of the record does not demonstrate any chilling effect, and defendant cites none. See *Wright*, 172 N.C. App. at 471, 616 S.E.2d at 370. Furthermore, the proceedings do nothing to cast the "taint of suspicion" on "[t]he purity and integrity of the judicial process[.]" See *Fie*, 320 N.C. at 628, 359 S.E.2d at 775 (citations and internal quotation marks omitted).

Accordingly, defendant's argument that the trial court erred by denying his motion for recusal is without merit.

**[5]** Finally, we write to caution the trial court with respect to the following statement:

The other thing I want to do is put on the record that I leave to the appellate courts whether or not any recommendation as to discipline should be made to any of the responses or conduct of the attorneys based upon the record in this case as to whether any of the Rules of Practice or Rules of Conduct have been violated.

It is unclear whether the statement related to (1) the issue of the State's closing arguments, (2) the exchanges between defendant's trial counsel and the trial court, (3) another specific, albeit unarticulated reason, or (4) other general concerns. Nonetheless, it is the trial court's responsibility initially to pass on these concerns if the court has them, especially in view of the fact that the trial court is in a better position than a Court of the Appellate Division both to observe and control the trial proceedings. See, e.g., *Augur v. Augur*, 356 N.C. 582, 586, 573 S.E.2d 125, 129 (2002) ("[T]rial courts are more adept than appellate courts at . . . litigation supervision . . . ." (citing *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233, 113 L. Ed. 2d 190, 199 (1991)). It is not for the trial court to abdicate its role in managing the conduct of trial to an appellate court whose task is to review the cold record.

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For the foregoing reasons, we hold no error.

No Error.

Judges ELMORE and STROUD concur.

Judge JACKSON concurred prior to December 31, 2010.

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STATE OF NORTH CAROLINA v. OMAR SIDY MBACKE, DEFENDANT

No. COA09-1395

(Filed 4 January 2011)

**1. Appeal and Error— preservation of issues—failure to give notice of appeal**

Although defendant contended that the trial court erred in a drugs case by denying his motion to suppress and denying his motions *in limine* at trial, defendant gave no written or oral notice of appeal from the judgment entered at the conclusion of the trial or from the order denying the motion to suppress. Thus, the only issue properly before the Court of Appeals was the trial court's denial of defendant's motion for appropriate relief.

**2. Appeal and Error— motion for appropriate relief—erroneous denial of motion to suppress evidence**

The trial court erred in a drugs case by denying defendant's motion for appropriate relief based on the denial of his request to suppress any evidence obtained by police as a result of a traffic stop. The warrantless search of defendant's vehicle incident to his arrest violated his Fourth Amendment rights because he was not within reaching distance of his vehicle, and there was not a reasonable basis for searching the vehicle for evidence of the offense for which defendant was arrested.

Judge STROUD dissenting.

Appeal by Defendant from order entered 16 June 2009 by Judge Ronald E. Spivey in Superior Court, Forsyth County. Heard in the Court of Appeals 14 April 2010.

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*Attorney General Roy A. Cooper, by Assistant Attorney General Martin T. McCracken, for the State.*

*Tin Fulton Walker & Owen, PLLC, by Noell P. Tin and Matthew G. Pruden, for Defendant-Appellant.*

McGEE, Judge.

Omar Sidy Mbacke (Defendant) appeals from the trial court's order denying his motion for appropriate relief. For the following reasons, we reverse.

### I. Factual Background and Procedural History

Defendant was indicted on 12 May 2008 for trafficking in cocaine, possession with intent to sell and deliver cocaine, trafficking cocaine by transportation, and carrying a concealed weapon. A superseding indictment was issued on 23 June 2008, charging Defendant with carrying a concealed weapon and trafficking in cocaine by transportation. On 17 April 2009, Defendant moved to suppress "any and all evidence [obtained by police] as a result of a traffic stop, seizure and arrest of . . . Defendant" on or about 5 September 2007.

Immediately prior to trial, Defendant's motion to suppress was heard. The State's evidence tended to show that on 5 September 2007, officers from the Winston-Salem Police Department responded to a 911 call stating that a "black male . . . wearing a yellow shirt[,] and "driving a red Ford Escape" was parked in the caller's driveway, armed with a handgun. Upon arriving at the caller's residence, officers "observed a maroon-red Ford Escape vehicle backing out of the driveway of the residence." The driver of the Ford Escape was a black male, wearing a yellow shirt. The officers exited their vehicles and, with their service weapons drawn, approached the Ford Escape and ordered the driver to stop and raise his hands in the air. The driver did not initially comply but, after repeated commands from the officers, he did stop and raise his hands. The officers then ordered the driver to exit the Ford Escape. The driver complied but, as he exited, he kicked the vehicle door shut. The driver was then placed in handcuffs. The driver of the maroon-red Ford Escape was identified at trial as Defendant. The officers advised Defendant that he was not under arrest but was being detained at the scene. In response to a question from the officers, Defendant informed them that he had a firearm concealed in his waistband. The officers removed a handgun from Defendant's waistband, placed Defendant under arrest, and

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secured him in the back of a patrol vehicle. The officers then conducted a search of the Ford Escape incident to arrest. The officers discovered “a cellophane-wrapped package that contained a white powdery substance” under the driver’s seat of the Ford Escape. A field test of the substance revealed that it was cocaine.

Following a hearing on 20 April 2009 on Defendant’s motion to suppress, the trial court denied Defendant’s motion and filed a written order on 1 May 2009. A jury found Defendant guilty on all counts on 23 April 2009. Defendant was sentenced to two concurrent sentences of 175 to 219 months in prison and was fined \$250,000.00. Pursuant to N.C. Gen. Stat. §§ 15A-1414(b)(1)(b) and 15A-1415(b)(7), Defendant filed a motion for appropriate relief on 1 May 2009, arguing that the trial court should have granted his motion to suppress and should dismiss the drug charges against him, based on the United States Supreme Court ruling in *Arizona v. Gant*, — U.S. —, 173 L. Ed. 2d 485 (2009), which was decided on 21 April 2009, during Defendant’s trial. A hearing was held on Defendant’s motion for appropriate relief on 20 May 2009. By order dated 16 June 2009, the trial court held that the ruling in *Gant* was applicable to Defendant’s case, but that Defendant was not entitled to relief under *Gant* and thus denied Defendant’s motion for appropriate relief. From the trial court’s order denying his motion for appropriate relief, Defendant filed written notice of appeal on 23 June 2009.

[1] Defendant brings forth arguments that the trial court erred in: (1) denying his motion to suppress, (2) denying his motions in limine at trial, and (3) denying his motion for appropriate relief. However, Defendant gave no written or oral notice of appeal from the judgment entered at the conclusion of his trial or from the trial court’s order denying his motion to suppress. As noted above, Defendant appealed only from the trial court’s denial of his motion for appropriate relief.<sup>1</sup> Therefore, Defendant’s assignments of error and arguments regarding errors committed by the trial court during his trial, and in denying his motion to suppress, are not properly before us. See *In re Cox*, 17 N.C.

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1. Defendant’s notice of appeal is very specific. It alleges that upon return of the jury’s verdicts, “the [c]ourt sentenced the Defendant and entered judgment on April 24, 2009.” The notice further sets out that *Gant* was decided during Defendant’s trial; that upon conclusion of Defendant’s trial, Defendant requested additional time to address the issues raised by *Gant*; and that Defendant therefore filed his motion for appropriate relief. The notice of appeal states that “an Order was issued on June 16, 2009 denying Defendant’s Motion for Appropriate Relief” and that “Defendant by and through his undersigned counsel . . . hereby gives Notice of Appeal to the North Carolina Court of Appeals from the Judgment in the Superior Court of Forsyth County entered June 16, 2009.”

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App. 687, 690-91, 195 S.E.2d 132, 134 (1973) (“[P]roceedings on appeal are ordinarily strictly limited to review of matters directly affecting the judgment, order, or decree appealed from, and other decisions, whether rendered before or after that directly appealed from, are not before the court.”) (citations omitted); N.C.R. App. P. 10(a). Therefore, Defendant’s only issue properly before this Court is whether the trial court erred in denying Defendant’s motion for appropriate relief.

[2] Defendant’s only argument regarding the denial of his motion for appropriate relief is that the denial of his motion to suppress should be reversed, based on *Gant*. In Defendant’s pre-trial motion to suppress, he raised several issues, including the officers’ search of Defendant’s vehicle incident to Defendant’s arrest. However, at the pre-trial hearing on the motion to suppress, the main issue in contention was whether the officers had a sufficient articulable and reasonable suspicion to stop Defendant’s vehicle. We note that the only issue addressed by *Gant* was the legality of the officers’ search incident to a lawful arrest; *Gant* does not address the legality of the vehicle stop. Therefore, based upon Defendant’s notice of appeal, our review is limited to the single issue regarding the search incident to a lawful arrest, as this is the only issue properly before us.

## II. Defendant’s Motion for Appropriate Relief

Our Court has previously held that, “[w]hen a trial court’s findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and maybe disturbed only upon a showing of manifest abuse of discretion. However, the trial court’s conclusions are fully reviewable on appeal.” *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citations omitted). The trial court’s order denying Defendant’s motion for appropriate relief incorporated the findings of fact from its previous order denying Defendant’s motion to suppress and made additional findings. The trial court made the following findings relevant to the search incident to Defendant’s arrest in its initial order denying Defendant’s motion to suppress:

The officer testified and the [c]ourt will find that he told the driver to step out of the vehicle and raise his hands, and that initially the driver lowered his hands to some extent or moved them to some extent toward his waist area as he was seated in the vehicle. But then upon further re-command, he held his hands back up and was ordered out of the vehicle.

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At that time a person who was driving the vehicle and the only occupant got out. It turned out to be . . . [D]efendant in this case. And as he did, the officer noted that . . . [D]efendant kicked the door shut with his foot.

At that time the person, now identified as . . . [D]efendant, did get onto the ground in a prone position, pursuant to the officer's orders.

At that time the officer holstered his service weapon and placed handcuffs on . . . [D]efendant as he lay there. He indicated to . . . [D]efendant orally that he was not under arrest, that he was being detained in handcuffs.

At that time he testified that he told the person on the ground, . . . [D]efendant in this case, why they were there and asked . . . [D]efendant if he had any guns or handguns, at which point . . . [D]efendant said, yes, that he had one in his waistband.

At that point the weapon was in fact retrieved from . . . [D]efendant's waistband and cleared and otherwise rendered safe for the moment, and . . . [D]efendant was then taken back to the officer's patrol car and seated there, now formally charged with carrying a concealed weapon.

During this time that he was in the vehicle of the first officer, Officer Horsley in fact looked into the vehicle, which was stopped, and indicated that he had found a package containing some white powder substance, which later tested positive for cocaine pursuant to a field test.

The trial court also found that "after seizing [the handgun], . . . [D]efendant was in fact placed in the police car and was in fact formally under arrest for carrying a concealed weapon, at which time a search incident to the arrest of the vehicle . . . was conducted[.]" In its order denying Defendant's motion for appropriate relief, the trial court made the following additional findings relevant to the search incident to Defendant's arrest for carrying a concealed weapon:

10. Officer Horsley searched . . . Defendant's vehicle after . . . Defendant was arrested, which was standard Winston-Salem Police Department procedure relying on the Supreme Court decision in New York v. Belton, 453 U.S. 454 (1981), in order to see if any contraband was located inside.

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11. Officer Horsley found approximately one kilogram of powder cocaine, packaged in plastic wrap. It was found under the driver's seat of . . . Defendant's vehicle, and it was half under the seat and half sticking out into the floorboard in front.

In its denial of Defendant's motion for appropriate relief, the trial court concluded:

11. Based on all the evidence presented, this [c]ourt rules that . . . Defendant in this case was secured and not within reaching distance of the passenger compartment of the vehicle at the time of the search.

12. This [c]ourt further rules that the officers in this case had reason to believe that evidence of the Carrying a Concealed Gun charge, for which . . . Defendant was arrested, and the report of a man with a gun at that location pursuant to the 911 call, would be located in the interior of . . . Defendant's vehicle.

13. Such evidence could include other firearms, gun boxes, holsters, ammunition, spent shell casings and other indicia of ownership of the firearm that was seized from . . . Defendant's person.

14. The case at bar is distinguishable from the case in Arizona v. Gant, where there was no reason for the officers to believe that additional evidence related to the offense of Driving While License Revoked would be located in Gant's vehicle.

The trial court therefore denied Defendant's motion for appropriate relief.

This Court has previously held that “[w]here . . . the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal.” *State v. Hudgins*, 195 N.C. App. 430, 432, 672 S.E.2d 717, 718 (2009) (citations omitted). Defendant did not assign error to the trial court's findings of fact in the order denying his motion to suppress or in the order denying his motion for appropriate relief. Therefore, those findings are binding on appeal. *See id.* Accordingly, our remaining analysis will focus on whether the trial court's findings support its conclusions of law and *de novo* review of the trial court's conclusions of law regarding the search of Defendant's vehicle incident to his arrest. *Lutz*, 177 N.C. App. at 142, 628 S.E.2d at 35.

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Defendant argues that the trial court erred in denying his motion for appropriate relief because the warrantless search of his vehicle was in violation of his rights under the Fourth Amendment of the United States Constitution. Specifically, Defendant contends that the warrantless search of his vehicle incident to his arrest was in violation of the rule established by the United States Supreme Court in *Gant* because (1) he was “handcuffed and placed in the patrol car” at the time of the search and was not within reaching distance of the passenger compartment and (2) there was no reason to further investigate the offense of carrying a concealed weapon with a search of Defendant’s vehicle because no further relevant evidence could be found as the concealed handgun at issue had already been discovered on Defendant’s person.

In *Gant*, two police officers came into contact with the defendant at a private residence. *Id.* at —, 173 L. Ed. 2d at 491. “The officers left the residence and conducted a records check, which revealed that [the defendant’s] driver’s license had been suspended and there was an outstanding warrant for his arrest for driving with a suspended license.” *Id.* The officers returned to the private residence and observed the defendant return to the residence, park at the end of the driveway, get out of his vehicle, and shut the door. *Id.* at —, 173 L. Ed. 2d at 492. The officers immediately approached the defendant, handcuffed him, and placed him under arrest for driving while his license was suspended. *Id.* When backup arrived, the officers locked the defendant in the back seat of a patrol vehicle, conducted a search of the defendant’s vehicle, and found a gun and narcotics. *Id.*

The defendant was charged with possession of narcotics and possession of drug paraphernalia. *Id.* The defendant moved to suppress the evidence seized from his vehicle on the grounds that the warrantless search violated the Fourth Amendment. *Id.* The trial court denied the defendant’s motion to suppress; the Arizona Supreme Court concluded that the search of the defendant’s vehicle was unreasonable and reversed the trial court’s denial of the defendant’s motion to suppress; and the state petitioned for writ of certiorari to the United States Supreme Court. *Id.* at —, 173 L. Ed. 2d at 492-93.

The United States Supreme Court stated the basic rule that “‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established

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and well-delineated exceptions.’” *Id.* at —, 173 L. Ed. 2d at 493 (quoting *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585 (1967)). The Court noted that “[a]mong the exceptions to the warrant requirement is a search incident to a lawful arrest.” *Id.* In *Gant*, the Court recognized that in *Chimel v. California*, 395 U.S. 752, 23 L. Ed. 2d 685 (1960), “a search incident to arrest may only include ‘the arrestee’s person and the area “within his immediate control” — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.’” *Gant*, — U.S. at —, 173 L. Ed. 2d at 493 (quoting *Chimel*, 395 U.S. at 763, 23 L. Ed. 2d at 694). The Court also noted that the rule in *Chimel* was applied in *New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768 (1981), in the context of a search of the defendant’s automobile, and the Court held that “when an officer lawfully arrests ‘the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile’ and any containers therein.” *Gant*, — U.S. at —, 173 L. Ed. 2d at 494 (quoting *Belton*, 453 U.S. at 460, 69 L. Ed. 2d at 775). The Court acknowledged that the rule in *Belton* had “been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.” *Id.* at —, 173 L. Ed. 2d at 495. The Court also noted that

[a]lthough it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” . . . . In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. . . . But in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee’s vehicle and any containers therein.

*Id.* at —, 173 L. Ed. 2d at 496 (citations omitted).<sup>2</sup> In further clarifying its prior rulings regarding the exception to the warrant requirement for searches incident to a lawful arrest, the Court held that

[p]olice may search a vehicle incident to a recent occupant’s arrest only if [(1)] the arrestee is within reaching distance of the

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2. In *Belton* and *Thornton*, the defendants were initially arrested on drug charges. See *Thornton v. United States*, 541 U.S. 615, 158 L. Ed. 2d 905 (2004); *New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768 (1981).

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passenger compartment at the time of the search or [(2)] it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

*Id.* at —, 173 L. Ed. 2d at 501. The United States Supreme Court affirmed the Arizona Supreme Court's conclusion that the search of the defendant's vehicle was unreasonable, as the defendant was not "within reaching distance of the passenger compartment at the time of the search" and it was not reasonable for the officers to believe that the vehicle would contain evidence of the offense of arrest, which was defendant's driving while his license was suspended. *Id.*

The State counters in the present case that, as permitted by *Gant*, when officers searched Defendant's vehicle, "they had reason to believe they would find evidence in the vehicle supporting the charge for which they had arrested [D]efendant[.]". The State explains that "had [D]efendant contested the concealed weapon charge, [the State] could have been required to use evidence" such as other firearms, gun boxes, holsters, ammunition, spent shell casings or other indicia of ownership of the firearm

to rebut claims by . . . [D]efendant of good faith mistake, inadvertence, duress or that he was not aware he had placed the gun in the waist band of his trousers. Without knowing what claims [D]efendant would eventually make, the officers were justified in searching for additional evidence establishing [D]efendant['s] intent to carry a concealed handgun.

We disagree with the State's reasoning because we perceive two problems arising from the highly fact-driven nature of the analysis required under *Gant*. First, the defenses of a good faith mistake, duress, or inadvertence could have also applied to traffic offenses such as that involved in *Gant*, where, for example, the defendant could have argued that he was driving without a license while under circumstances of duress. See e.g., *State v. Brown*, 182 N.C. App. 115, 646 S.E.2d 775 (2007) (discussing the applicability of the defense of duress to motor vehicle charges). We interpret the Supreme Court's holding in *Gant* to require an officer to suspect the presence of more direct evidence of the crime of arrest than the highly indirect circumstantial evidence the State contends may be necessary to rebut possible defenses.

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Second, we do not believe that the hypothetical evidence posited by the State, and set forth in the trial court's findings of fact, would be relevant to the crime of carrying a concealed weapon. The trial court concluded that the following evidence would be helpful in establishing Defendant's intent: "other firearms, gun boxes, holsters, ammunition, spent shell casings and other indicia of ownership of the firearm that was seized from . . . Defendant's person." This evidence may be generally classified in two categories: (1) evidence of separate offenses; and (2) evidence unrelated to the offense of carrying a concealed weapon.

With respect to the hypothetical evidence of separate offenses, if the officers had discovered another concealed weapon in Defendant's vehicle, they would have been justified in charging Defendant with an additional count of carrying a concealed weapon. *See State v. Johnson*, 149 N.C. App. 669, 562 S.E.2d 606, 2002 WL 485386 (2002) (unpublished opinion) (reviewing appeal of defendant charged with two counts of carrying a concealed weapon where the defendant inadvertently revealed one handgun concealed beneath a stack of newspapers in his vehicle and officers later discovered a second handgun concealed in the vehicle). While *Gant* does authorize officers to search a vehicle when they have reasonable grounds to believe they may find evidence in the vehicle related to the offense of arrest, we do not interpret *Gant* as authorizing officers to search vehicles for evidence justifying additional charges. *See Gant*, 556 U.S. at —, 173 L. Ed. 2d at 498 (discussing *United States v. Ross*, 456 U.S. 798, 820-21, 72 L. Ed. 2d 572 (1982), and noting that *Ross* allows a search of portions of a vehicle for evidence of other crimes based on probable cause to believe the vehicle contains evidence of criminal activity, rather than the lower standard of a reasonable basis to believe the evidence will be found in the vehicle).

With respect to the evidence the State contends would be relevant to proving Defendant's intent to carry a concealed weapon, N.C. Gen. Stat. § 14-269(a1) provides that it is unlawful for "any person willfully and intentionally to carry concealed about his person any pistol or gun except [when]. . . [t]he person is on the person's own premises." N.C. Gen. Stat. § 14-269(a1) (2009). Our Supreme Court has stated the elements of this crime in the following manner: "The essential elements of the statutory crime of carrying a deadly weapon are these: (1) The accused must be off his own premises; (2) he must carry a deadly weapon; (3) the weapon must be concealed about his person." *State v. Williamson*, 238 N.C. 652, 654,

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78 S.E.2d 763, 765 (1953). Intent is an essential element required by N.C.G.S. § 14-269(a1); however, our Supreme Court has long held that “[t]he criminal intent in such cases is the intent to carry the weapon concealed.” *State v. Dixon*, 114 N.C. 850, 852, 19 S.E. 364, 364 (1894). Thus, the focus of the crime is whether a defendant carried a weapon, while outside his own premises, and intentionally concealed that weapon about his person. We therefore disagree with the trial court’s reasoning that the officers had reasonable grounds to believe they would find evidence in Defendant’s vehicle to support any of these elements.

The trial court also supposed hypothetical evidence of “gun boxes, holsters, ammunition, spent shell casings and other indicia of ownership of the firearm.” We disagree with the trial court’s reasoning that a handgun holster, found unused in Defendant’s vehicle, was relevant to proving Defendant’s intent at the time the officers found him in possession of a handgun concealed in his waistband. Further, neither ownership nor use of a weapon are elements of carrying a concealed weapon. *Williamson*, 238 N.C. at 654, 78 S.E.2d at 765. Therefore, we hold that evidence of ownership or use is irrelevant to the charge. Likewise, evidence of a gun box is similarly not proof of any element of the charge. *Id.* As with the traffic offenses discussed in *Gant*, we find it unreasonable to believe an officer will find in, or even need to seek from, a defendant’s vehicle further evidence of carrying a concealed weapon when the officer has found the defendant off the defendant’s own premises and carrying a weapon which is concealed about his person.

Thus, we hold that it was not “reasonable to believe [Defendant’s] vehicle contain[ed] evidence of the offense” of carrying a concealed weapon. *Gant*, 556 U.S. —, 173 L. Ed. 2d at 501. Because Defendant was not within reaching distance of his vehicle, and the fact that there was not a reasonable basis for searching the vehicle for evidence of the offense for which Defendant was arrested, the search violated Defendant’s Fourth Amendment rights, pursuant to *Gant*. We therefore reverse the denial of Defendant’s motion for appropriate relief.

Reversed.

Judge HUNTER, JR. concurs.

Judge STROUD dissents with a separate opinion.

STROUD, Judge, dissenting.

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I respectfully dissent, as I believe that the majority opinion applies *Arizona v. Gant*, — U.S. —, 173 L. Ed. 2d 485 (2009) incorrectly. The majority opinion's view of the "reasonableness" of the officers' belief that the vehicle may contain evidence of the offense of arrest is too narrow, and this application of *Gant* may seriously impair the ability of law enforcement officers to perform their job of responding to emergency calls and investigating potential crimes at these calls.

The majority has accurately and fully set forth the facts of the case and the trial court's findings and conclusions, so I will not reiterate them here except as necessary. The majority notes and rejects the State's argument that when the officers searched defendant's vehicle, "they had reason to believe they would find evidence in the vehicle supporting the charge for which they had arrested defendant[.]" The State argued that "had defendant contested the concealed weapon charge, [the State] could have been required to use evidence" such as other firearms, gun boxes, holsters, ammunition, spent shell casings or other indicia of ownership of the firearm

to rebut claims by the defendant of good faith mistake, inadvertence, duress or that he was not aware he had placed the gun in the waist band of his trousers. Without knowing what claims defendant would eventually make, the officers were justified in searching for additional evidence establishing defendant['s] intent to carry a concealed handgun.

The majority rejects the State's reasoning, as well as that of the trial court, but I do not. Here, the trial court's findings establish that defendant was arrested for carrying a concealed weapon and before the officers conducted a search of defendant's vehicle incident to that arrest, defendant was handcuffed and secured in the back of a patrol vehicle. Therefore, as in *Gant*, defendant was not "within reaching distance of the passenger compartment at the time of the search." *See id.* at —, 173 L. Ed. 2d at 501. In contrast to *Gant*, defendant was not arrested for a traffic offense but for carrying a concealed weapon in violation of N.C. Gen. Stat. § 14-269(a1) (2007), which states that "[i]t shall be unlawful for any person willfully and intentionally to carry concealed about his person any pistol or gun . . . ." An essential element of this crime is the intent to carry the weapon concealed. *See State v. Reams*, 121 N.C. 556, 557, 27 S.E. 1004, 1005 (1897) ("The offense of carrying a concealed weapon about one's person and off his own premises consists in the guilty intent to carry it concealed . . . and the possession of the weapon raises the presumption of guilt,

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which presumption may be rebutted by the defendant.”). If defendant at trial had argued that he lacked the intent to conceal the weapon found on his person because of a good faith mistake, duress, or inadvertence, the State would have been required to produce evidence to counter those claims. Evidence that would be helpful in establishing defendant’s intent that could have been discovered in defendant’s vehicle might include other concealed firearms in the vehicle or a concealed handgun holster, lock-box, or storage-case; officers could have also discovered other indicia of ownership or use of the firearm seized such as ammunition or spent shell casings.

The majority rejects the “hypothetical evidence posited by the State, and set forth in the trial court’s findings of fact” as irrelevant to the crime of carrying a concealed weapon. However, I disagree, as the potential items of evidence listed were those identified in the uncontested findings of fact of the trial court, based upon the State’s evidence. In addition, the law supports the State’s argument that such evidence may be relevant to the charge of carrying a concealed weapon. I do not believe that this Court should substitute its judgment for that of the trial court as to this uncontested finding of fact. *See State v. High*, 183 N.C. App. 443, 447, 645 S.E.2d 394, 396-97 (2007) (holding that the trial court’s uncontested findings of facts were binding on appeal).

I also believe that we must consider reasonableness in the context of the situation to which the officers were responding. They were responding to a 911 call in which a citizen, Mr. Hall, reported that a man armed with a gun was in his driveway and that the same man had “shot up” his house the night before. When the first officer arrived about three minutes after the call, he found defendant exactly as Mr. Hall described in a car in the driveway. The officers were not responding to a call reporting that defendant, or anyone else, had a concealed weapon; they were first and foremost seeking to prevent anyone from being shot and to protect the public from a man with a gun. They had no way of knowing, upon responding to the call, exactly what they would find or how dangerous the situation would be. Fortunately, no shots were fired and no one was injured. However, the majority’s opinion requires the officers to make immediate and very fine legal distinctions about what evidence is or is not related to the exact offense for which they have arrested a defendant—even if they might have arrested him for other offenses as well. The officers’ actions in this situation were entirely reasonable. *See Brinegar v. United States*, 338 U.S. 160, 176, 93 L. Ed. 1879, 1891

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(1949) (“Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.”). I therefore agree with the trial court that it was “reasonable to believe the vehicle contain[ed] evidence of the offense of arrest.” *Gant*, — U.S. at —, 173 L. Ed. 2d at 501.

Accordingly, I would hold that the trial court’s findings of fact support its conclusions of law, that the search of defendant’s vehicle following his arrest was lawful, and I would affirm the denial of defendant’s motion for appropriate relief.

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ANDREW C. WHITE AND WIFE, BARBARA W. WHITE, PLAINTIFFS V. COLLINS BUILDING, INC., EDWIN E. COLLINS, JR., KERSEY CORPORATION, JOHNNY KERSEY, JOSEPH LEE WILLIAMS, AND AEA & L, LLC, DEFENDANTS

No. COA10-216

(Filed 4 January 2011)

**Construction Claims— construction defects—builder—individual liability**

The trial court erred in dismissing plaintiffs’ claim for negligent construction against defendant builder in his individual capacity. As an individual member of a limited liability company, defendant builder was individually liable for his own torts, including negligence.

Appeal by Plaintiffs from order entered 6 October 2009 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 2 September 2010.

*Ward and Smith, P.A., by Ryal W. Tayloe and Michael J. Parrish, for Plaintiffs.*

*Chleborowicz & Theriault, LLP, by Christopher M. Theriault and Christopher A. Chleborowicz, for Defendant Edwin E. Collins, Jr.*

STEPHENES, Judge.

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*I. Procedural History*

On 7 May 2009, Plaintiffs Andrew C. White and Barbara W. White filed a complaint in New Hanover County Superior Court seeking damages related to alleged construction defects in Plaintiffs' home. Plaintiffs brought various claims against the builder of the home, Collins Building, Inc. ("Collins Building"), Collins Building's president, Edwin E. Collins, Jr. ("Defendant") in his individual capacity, plumbing subcontractors Kersey Corporation and Johnny Kersey, framing subcontractor Joseph Lee Williams ("Mr. Williams"), and the developer of the home, AEA & L, LLC ("AEA"). On 29 July 2009, Defendant filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) to dismiss Plaintiffs' negligence claim against him in his individual capacity. On 6 October 2009, the trial court heard the motion and entered an order dismissing Plaintiffs' negligence claim against Defendant. Plaintiffs filed notice of appeal from the trial court's order on 5 November 2009. On 5 January 2010, Plaintiffs voluntarily dismissed all claims against Collins Building, Kersey Corporation, Johnny Kersey, Mr. Williams, and AEA without prejudice pursuant to N.C. Gen. Stat. §1A-1, Rule 41(a).

*II. Factual Background*

Plaintiffs' complaint alleges the following: In May of 2003, Plaintiffs purchased a newly constructed oceanfront home in Wrightsville Beach, North Carolina from AEA, the developer of the home. AEA had contracted with Collins Building to construct the residence. Defendant, the qualifier for Collins Building on its general contractor's license and president and sole shareholder of Collins Building, oversaw and personally supervised construction of the residence.

In October of 2006, Plaintiffs began having problems with the windows and doors in the main living area of their home. Plaintiffs noticed a slight buckling of the floors underneath the glass doors and windows as well as water intrusion around the windows after a storm. Plaintiffs contacted Defendant, who informed them that the doors needed caulking. Defendant had someone apply caulk around the doors and also advised Plaintiffs to clean any sand out of the window sills to ensure a tight seal.

In late 2008 and early 2009, Plaintiffs noticed more significant water damage to the hardwood floors and trim around the windows as well as rusting window sashes and springs. When Plaintiffs had the windows professionally inspected in April and May of 2009, they

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discovered severe damage to the windows and surrounding areas that required replacement of the windows.

In addition to the damaged windows, Plaintiffs' home suffered significant damage to several walls and a ceiling when four different water pipes burst between July 2007 and February 2009. In each instance, hot water pipes joined by copper fittings separated. Upon professional inspection of the plumbing system, Plaintiffs discovered that all of the hot water lines in their home had to be replaced.

Plaintiffs allege that the damage to their home and the cost of the resulting repairs were proximately caused by the negligence of Defendant in failing to properly supervise the construction of Plaintiffs' home.

*III. Discussion*

By Plaintiffs' sole argument on appeal, Plaintiffs contend that the trial court erred in dismissing their negligence claim against Defendant in his individual capacity. For the reasons stated herein, we agree with Plaintiffs.

*A. Standard of Review*

"On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted." *Allred v. Capital Area Soccer League, Inc.*, 194 N.C. App. 280, 282, 669 S.E.2d 777, 778 (2008) (citation and quotation marks omitted). "Under Rule 12(b)(6), a claim should be dismissed where it appears that plaintiff is not entitled to relief under any set of facts which could be proven." *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 299, 435 S.E.2d 537, 541 (1993) (citation omitted), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1994). "This occurs where there is a lack of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim." *Id.* "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Craven v. SEIU COPE*, 188 N.C. App. 814, 816, 656 S.E.2d 729, 732 (2008) (citation and quotation marks omitted).

*B. Individual Liability*

"Actionable negligence occurs [] where there is a failure to exercise proper care in the performance of some legal duty which the

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defendant owed the plaintiff, under the circumstances in which they were placed.” *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation and quotation marks omitted). “The law imposes upon the builder of a house the general duty of reasonable care in constructing the house to anyone who may foreseeably be endangered by the builder’s negligence, including a subsequent owner who is not the original purchaser.” *Everts v. Parkinson*, 147 N.C. App. 315, 333, 555 S.E.2d 667, 679 (2001) (citing *Oates v. JAG, Inc.*, 314 N.C. 276, 280-81, 333 S.E.2d 222, 225-26 (1985) (plaintiffs, the third purchasers of a house, were allowed to bring an action against the builder for negligent construction of the house)); *see also Floraday v. Don Galloway Homes*, 340 N.C. 223, 456 S.E.2d 303 (1995) (owner of a house who was not the original purchaser had a cause of action against the builder for negligence in the construction of a backyard retaining wall that materially affected the structural integrity of the house). The lack of privity between a subsequent purchaser of a home and the builder of the home does not bar the purchaser’s negligence claim against the builder. *Oates*, 314 N.C. at 281, 333 S.E.2d at 226. This is because although the “duty owed by a defendant to a plaintiff may have sprung from a contractual promise made to another[,] . . . the duty sued on in a negligence action is not the contractual promise but the duty to use reasonable care in affirmatively performing that promise. The duty exists independent of the contract.” *Id.* at 279, 333 S.E.2d at 225 (citation and quotation marks omitted).

In this case, Plaintiffs purchased a newly constructed home from AEA, the developer of the home. AEA had contracted with Collins Building to construct the home. Even though Plaintiffs were not in privity of contract with Collins Building, under *Oates*, the lack of privity does not bar Plaintiffs from bringing an action for negligent construction against the builder. *Id.* at 281, 333 S.E.2d at 226.

Defendant argues that Plaintiffs may not bring a negligence action against him individually because any action that he took was done on behalf of, and as an agent for, Collins Building. Defendant misapprehends the law.

It is well settled that an individual member of a limited liability company or an officer of a corporation may be individually liable for his or her own torts, including negligence. *See Wilson v. McLeod Oil Co.*, 327 N.C. 491, 518, 398 S.E.2d 586, 600 (1990) (an officer of a corporation “can be held personally liable for torts in which he

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actively participates[,]” even though “committed when acting officially” (citation and quotation marks omitted)); *Strang v. Hollowell*, 97 N.C. App. 316, 318, 387 S.E.2d 664, 666 (1990) (“It is well settled that one is personally liable for all torts committed by him, including negligence, notwithstanding that he may have acted as agent for another or as an officer for a corporation.”); *Esteel Co. v. Goodman*, 82 N.C. App. 692, 348 S.E.2d 153 (1986) (an officer of a corporation who commits a tort is individually liable for that tort, even though acting on behalf of the corporation in committing the act), *disc. rev. denied*, 318 N.C. 693, 351 S.E.2d 745 (1987); *Palomino Mills, Inc. v. Davidson Mills Corp.*, 230 N.C. 286, 52 S.E.2d 915 (1949);<sup>1</sup> *Wachovia Bank & Trust Co. v. Southern R. Co.*, 209 N.C. 304, 308, 183 S.E. 620, 622 (1935) (“[I]n this State an agent or servant, under proper allegations of negligence, which is the proximate or one of the proximate causes of the injury, plaintiff being free from blame, and proof to that effect, is liable to third parties for acts of malfeasance or nonfeasance—commission or omission—done in the scope of his employment.”). Although a properly formed and maintained business entity, like a limited liability company or corporation, may provide a shield or “veil” of protection from personal liability for an individual member or officer, see *Statesville Stained Glass v. T.E. Lane Constr. & Supply Co.*, 110 N.C. App. 592, 430 S.E.2d 437 (1993), this protection is not absolute. The two most common methods of establishing personal liability in a business setting are “piercing the corporate veil” and individual responsibility for torts, such as breach of fiduciary duty, negligence, fraud, and misrepresentation. See *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985) (“[C]ourts will disregard the corporate form or ‘pierce the corporate veil,’ and extend liability for corporate obligations beyond the confines of a corporation’s separate entity, whenever necessary to prevent fraud or to achieve equity.”); *Hollowell*, 97 N.C. App. at 318, 387 S.E.2d at 666 (“It is well settled that one is personally liable for all torts committed

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1. “[I]t is thoroughly well settled that a man is personally liable for all torts committed by him, consisting in misfeasance, as fraud, conversion, acts done negligently, etc., notwithstanding he may have acted as the agent or under directions of another; that ‘this is true to the full extent as to torts committed by officers or agents of a corporation in the management of its affairs’; that ‘the fact that the circumstances are such as to render the corporation liable is altogether immaterial’; that ‘the person injured may hold either liable, and generally he may hold both as joint tort-feasors’; that ‘corporate officers are liable for their torts, although committed when acting officially’; and that the officers ‘are liable for their torts regardless of whether the corporation is liable.’” *Id.* at 292, 52 S.E.2d at 919 (quoting *Minnis v. Sharpe*, 198 N.C. 364, 367, 151 S.E. 735, 737 (1930)).

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by him, including negligence, notwithstanding that he may have acted as agent for another or as an officer for a corporation.”). Moreover, “the potential for corporate liability, in addition to individual liability, does not shield the individual tortfeasor from liability. Rather, it provides the injured party a choice as to which party to hold liable for the tort.” *Hollowell*, 97 N.C. App. at 318-19, 387 S.E.2d at 666.

In *Wilson v. McLeod Oil Co.*, *supra*, the North Carolina Supreme Court addressed a company president’s personal liability for negligence. Plaintiffs alleged that their water wells had been contaminated by gasoline leaked from nearby gas stations. Plaintiffs brought suit against, *inter alia*, the president of an oil company that had installed underground storage tanks for and supplied gasoline to one of the gas stations. 327 N.C. at 500-01, 398 S.E.2d at 590. The forecast of the evidence showed that the president

personally participated in the activities surrounding the delivery and sale of gasoline at the . . . property. He signed the contract which allowed [the company] to install the tanks on the property; he generally oversaw the conducting of business there by [the company] as well as by [another company], which serviced the tanks and equipment and performed any repairs; and he signed the papers arranging for the deliveries of the gasoline to the property, supervised the account, and was the person contacted about the loss of gasoline from the tanks[.]

*Id.* at 518, 398 S.E.2d at 600. The president asserted that he could not be held personally liable for any negligence since he had been acting as a corporate officer. However, the Court held that “a corporate officer can be held personally liable for torts in which he actively participates.” *Id.* (citing *Minnis*, 198 N.C. at 367, 151 S.E. at 737). “Furthermore, corporate officers ‘are liable for their torts regardless of whether the corporation is liable.’” *Id.* (quoting *Minnis*, 198 N.C. at 367, 151 S.E. at 737). Thus, even though he was acting in his corporate capacity, the president’s participation in the activities which were alleged to have led to the gas leaks was sufficient to allow plaintiffs’ tort claims against the president in his individual capacity to survive summary judgment.

Similarly in *Esteel Co. v. Goodman*, *supra*, this Court addressed whether a defendant, the president of a corporation charged with the conversion of a crane, could be held personally liable for the conversion. The certificate guaranteeing the quality of the crane, which accompanied the sale of the crane which caused the conversion,

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was signed by the president in his representative capacity, and the president admitted his participation in the sale. Reiterating the rule that “an officer of a corporation who commits a tort is individually liable for that tort, even though the officer may have acted on behalf of the corporation in committing the wrongful act[,]” 82 N.C. App. at 697, 348 S.E.2d at 157, this Court held that the president was personally liable for the conversion caused by the sale of the crane.

Appellate courts in this State have not addressed in a published opinion the imposition of individual tort liability on a corporate officer in a construction context. However, courts in other jurisdictions have addressed this issue. In *Sturm v. Harb Dev., LLC*, 2 A.3d 859 (Conn. 2010), plaintiff-homeowners brought an action against Harb Development, LLC (“Harb Development”) and its principal, John J. Harb (“Mr. Harb”), alleging that their poor workmanship in the construction of the plaintiffs’ new home constituted, *inter alia*, negligence and fraud, and violated Connecticut General Statutes. *Id.* at 863. Mr. Harb moved the trial court to dismiss the allegations against him personally, seeking the protection of his LLC, Harb Development. Mr. Harb argued that absent facts sufficient to pierce the veil of protection of the LLC, Mr. Harb personally was immune from liability. *Id.* at 864.

The trial court granted the motion to dismiss primarily on the ground that no facts were alleged in the complaint to pierce the veil of the LLC. *Id.* at 863. However, the Connecticut Supreme Court concluded that the trial court “improperly required the plaintiffs to plead facts sufficient to pierce the corporate veil in order to establish [Mr. Harb’s] personal liability.” *Id.* at 864. The Court stated:

It is well established that an officer of a corporation does not incur personal liability for its torts merely because of his official position. Where, however, an agent or officer commits or participates in the commission of a tort, whether or not he acts on behalf of his principal or corporation, he is liable to third persons injured thereby. . . . Thus, a director or officer who commits the tort or who directs the tortious act done, or participates or operates therein, is liable to third persons injured thereby, even though liability may also attach to the corporation for the tort.

*Id.* at 866-67 (citations and quotation marks omitted).

Although the Court ultimately found that there were insufficient facts alleged in the complaint to establish the negligence claim against Mr. Harb personally, the Court rejected the argument that Mr.

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Harb could not be personally liable for negligence merely because he was a member of an LLC.

Similarly, in *Brown v. Rentz*, 441 S.E.2d 876 (Ga. App. 1994), plaintiffs, purchasers of a new home, filed an action against Rentz Builders, Inc., Lonnie S. Rentz (“Mr. Rentz”), a shareholder, director, and officer in Rentz Builders, Inc., and Linda Rentz, the corporate secretary for Rentz Builders, Inc. Plaintiffs alleged claims for negligent construction of the residence and negligent misrepresentation in the sale of the residence to plaintiffs. The trial court granted the individual Rentzes’ motions for summary judgment on the ground that plaintiffs had presented no evidence showing that either of the Rentzes, in their individual capacities, had participated in the sale or had disregarded the corporate entities they represented. *Id.* at 877.

The Georgia Court of Appeals agreed that the corporate veil should not have been pierced and “that the evidence established that [Mr. Rentz] did not build the house in his individual capacity.” *Id.* at 878. However, the Court explained:

[I]t is well established that an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor, (and) an officer of a corporation who takes no part in the commission of a tort committed by the corporation is not personally liable unless he specifically directed the particular act to be done or participated or co-operated therein.

*Id.* (citation and quotation marks omitted).

The record before the Court showed that “[Mr.] Rentz oversaw the subcontract work, did ‘small stuff’—‘trim work,’ ‘a little of the paint work,’ responded personally when the Browns called, and personally performed some repair work they now claim was defective.” *Id.* The Court thus concluded that the jury would have been authorized to find Mr. Rentz personally liable for negligent construction “because he specifically directed the manner in which the house was constructed or participated or cooperated in its negligent construction.” *Id.* (citation and quotation marks omitted).

The *Sturm* and *Brown* cases are not binding authority on this Court, but their analyses are instructive in this case. Similar to Mr. Harb and Mr. Rentz, Defendant in this case is the president and sole shareholder of Collins Building, the company responsible for constructing Plaintiffs’ home. Plaintiffs allege that Defendant “oversaw and personally supervised the day-to-day construction of [Plaintiffs’]

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residence." Plaintiffs further allege that Defendant was negligent in "failing to properly supervise the construction of the residence, including, but not limited to, failing to properly supervise the installation of the doors and windows, the flashing around the doors and windows, and the house wrap" and in "fail[ing] to properly supervise the design and installation of the plumbing system, including the hot water lines and other system components."

Similar to *Sturm and Brown*, Defendant moved the trial court to dismiss the allegations against him personally, seeking the protection of his corporation, Collins Building. Defendant argued before the trial court, and argues on appeal, that absent facts sufficient to pierce the veil of protection of the corporation, Defendant personally is immune from liability.

However, as in Connecticut and Georgia, it is well-settled law in North Carolina

that one is personally liable for all torts committed by him, including negligence, notwithstanding that he may have acted as agent for another or as an officer for a corporation. Furthermore, the potential for corporate liability, in addition to individual liability, does not shield the individual tortfeasor from liability. Rather, it provides the injured party a choice as to which party to hold liable for the tort.

*Hollowell*, 97 N.C. App. at 318-19, 387 S.E.2d at 666 (internal citations omitted). As in *Sturm*, Defendant's argument "fails . . . to acknowledge our well established common-law exception to individual liability in a corporate context for an individual's tort liability." *Sturm*, 2 A.3d at 868. Accordingly, based on well-settled law in North Carolina, Defendant may be personally liable for negligence if the facts support a negligence claim against him.

Defendant relies on this Court's unpublished opinion, *Nudelman v. J.A. Booie Bldg. Contractor*, 2003 N.C. App. LEXIS 509, No. COA02-267 (Mar. 4, 2003), which relies on *Statesville Stained Glass v. T.E. Lane Construction & Supply, supra*, to support his contention that he cannot be held personally liable for the alleged negligence in this case. We first note that as an unpublished case, *Nudelman* is not controlling authority. See *Day v. Brant*, — N.C. App. —, —, 697 S.E.2d 345, 356 (2011). Nonetheless, Defendant's reliance is misplaced for the following reasons.

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In *Statesville*, plaintiff filed a complaint against T.E. Lane Construction and Supply Co., Inc. (“Lane Construction”), Temple Construction Co. (“Temple Construction”), and Terrence E. Lane (“Lane”), the sole shareholder and chief executive officer of both companies, in his individual capacity. 110 N.C. App. at 593, 430 S.E.2d at 438. Plaintiff sought payment of a \$15,374.00 debt owed for stained glass it had manufactured for Lane Construction pursuant to a contract between plaintiff and Lane Construction. Following a bench trial, the court concluded that the evidence supported disregarding the corporate entities of both Lane Construction and Temple Construction and extending liability for the debt to Lane, in his individual capacity. *Id.* at 595, 430 S.E.2d at 439.

On appeal, this Court made the following observations about the propriety of piercing the corporate veil:

[I]n a close corporation, the principal or sole stockholder [is] permitted by law to play an active role in management, [and] may deal with third parties without incurring personal liability, as long as the separate corporate identity is maintained. In cases arising out of contracts with a close corporation, where another party has voluntarily dealt with the corporation, corporate separateness is usually respected. This is so because [i]f the other contracting party has agreed to look to the corporation, and thus only to the assets that have been contributed to it, courts understandably are reluctant to remake the bargain by permitting the other party to pierce the corporate veil and pursue the shareholders' noncorporate assets.

*Id.* at 597, 430 S.E.2d at 440 (citations and quotation marks omitted). This Court found that the parties had stipulated that plaintiff contracted with Lane Construction and that the trial court's findings of fact that “Lane was the chief executive officer, sole shareholder, and ‘controller’ of Lane Construction” and that “plaintiff at all times dealt with Lane” were supported by the evidence. *Id.* However, we concluded that “these findings, even though supported by the evidence, cannot provide the basis for the court's conclusion of law that [Lane Construction] had [no] will or existence separate and apart from Lane,’ or that ‘[t]he stock control as exercised by Lane justifies piercing the corporate veil of [Lane Construction].’” *Id.* at 598, 430 S.E.2d at 441. This Court explained:

[P]laintiff presented no evidence that Lane used Lane Construction to conduct personal business or for personal

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benefit. Furthermore, plaintiff's bare assertion that Lane used Lane Construction to defraud plaintiff, without supporting evidence, does not support the court's conclusion that 'Lane exercised excessive control on [Lane Construction], at least partially, in order to escape liability in violation of plaintiff's rights.' To the contrary, the evidence presented by plaintiff shows only that Lane and the other members of the board of directors agreed to dissolve Lane Construction due to the financial condition of the corporation, and that its assets were liquidated to help pay off company debts.

*Id.* (internal citation omitted). This Court thus held "that the trial court erred in concluding that the corporate entity of Lane Construction should be disregarded." *Id.*<sup>2</sup> Accordingly, the trial court's judgment against Lane, individually, was reversed.

In *Nudelman*, plaintiffs entered into a contract with J.A. Boo Building Contractor, Inc. ("Booe Building") to construct their residence. After the home was completed, plaintiffs discovered defects in the home's synthetic stucco exterior and brought suit against both Booe Building and its president, James Booe (defendant"). *Id.* at \*1-4. Plaintiffs alleged, *inter alia*, that defendant " 'was careless and negligent . . . in conducting and supervising the construction of plaintiffs' house.' " *Id.* at \*4. "Plaintiffs [sought] to pierce Booe Building's corporate veil and hold defendant personally liable for the alleged defects in their home[.]" *Id.* at \*7.

Relying on *Statesville*, this Court stated:

[P]laintiffs seek to hold defendant individually liable for the alleged construction defects in their home, even though defendant, individually, was not a party to the construction contract. The contract itself imposed no obligations on defendant Boo Building individually. Throughout construction, defendant served as an officer, employee, and agent of Boo Building and acted within the scope and course of his employment. The fact that defendant had an ownership interest in Boo Building and exercised control over the corporation does not, without more, subject him to personal liability for the liabilities incurred by Boo Building. Under *Statesville*, plaintiffs could maintain a negligence action against defendant in his individual capacity only if they showed

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2. We further held that the trial court's determination that the corporate entity of Temple Construction should be disregarded was contrary to law. *Id.*

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(1) that defendant acted outside the course and scope of his employment; or (2) that the corporation was a sham (thereby justifying the piercing of the corporate veil). Upon review, we discern no such showing by plaintiffs.

*Id.* at \*11-12.

We first note that *Statesville* involved a claim for payment of a business debt arising out of a breach of contract claim, and did not involve a negligence action. Thus, *Nudelman*'s assertion that “[u]nder *Statesville*, plaintiffs could maintain a *negligence action* against defendant in his individual capacity only if they showed (1) that defendant acted outside the course and scope of his employment; or (2) that the corporation was a sham (thereby justifying the piercing of the corporate veil)[,]” *id.* at \*11 (emphasis added), is an inaccurate representation of the holding in *Statesville*.

Moreover, following the analysis under *Statesville*, the *Nudelman* Court addressed Booé's liability solely under a piercing the corporate veil theory and did not discuss Booé's personal liability for negligence under the common-law rule applied in *Wilson*, *Esteel*, and *Hollowell*.<sup>3</sup> Because the common-law rule applies even in the absence of facts sufficient to pierce the corporate veil, the Court's analysis in *Nudelman* is not applicable here.

As the allegations of Plaintiffs' complaint, treated as true, adequately state a claim against Defendant for negligence, the trial court erred in granting Defendant's motion to dismiss. Accordingly, the order of the trial court is reversed and the matter is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges ELMORE and JACKSON concur.

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3. The *Nudelman* Court further noted that plaintiffs could not maintain an action against defendant in tort even if he was the contractor as plaintiffs were the promisees in the construction contract, and “[o]ur Supreme Court has stated that ‘ordinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor.’” *Id.* at \*12 (citation omitted). This analysis is inapplicable in the present case, however, as Plaintiffs are not promisees of a contract with Defendant.

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**LOCKETT v. SISTER-2-SISTER SOLUTIONS, INC.**

[209 N.C. App. 60 (2011)]

JERRIAN O. LOCKETT, PLAINTIFF v. SISTER-2-SISTER SOLUTIONS, INC.  
AND ROSA S. LOCKETT (AKA ROSA SUTTON), DEFENDANTS

No. COA09-1387

(Filed 4 January 2011)

**1. Corporations— piercing corporate veil—allegation not sufficient**

The trial court did not err by granting summary judgment for defendant Lockett on a breach of contract claim arising from plaintiff's employment termination. Plaintiff alleged that the corporate veil should be pierced to reach Lockett but did not provide a forecast of evidence to oppose defendant's motion.

**2. Civil Procedure— summary judgment—deposition not considered—no prejudice**

The trial court should have reviewed a deposition plaintiff attempted to offer in opposition to a motion for summary judgment, but there was no prejudice because plaintiff offered the deposition on a different issue and did not offer evidence that may have created a genuine issue of fact on the issue at hand.

**3. Employer and Employee— Wage and Hour Claim—summary judgment for defendant**

The trial court did not err by granting summary judgment for defendant Lockett on a Wage and Hour claim arising from plaintiff's employment termination where plaintiff did not offer evidence to support the existence of a genuine issue of material fact.

**4. Trials— directed verdict—based upon ruling of prior judge**

The trial court erred by directing a verdict for defendant Sister-2-Sister and dismissing plaintiff's breach of contract claim in an action arising from an employment dispute. The trial court was not free to conclude that the contract was legally unenforceable because of prior rulings by two courts.

**5. Trials— enforceability of contract—ruling by first judge determinative**

A trial court did not err by basing its determination of whether a contract was enforceable on a prior determination by another judge where defendant argued that the second judge had

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the benefit of hearing evidence and could properly reconsider the conclusion of the first. The first and second judge based their conclusions on the law and the face of the contract, which are not affected by evidence of a person's intent or understanding. Furthermore, one superior court judge may not correct another's errors of law.

**6. Contracts— enforceability—at-will doctrine—erroneous ruling prejudicial**

There was prejudice from the court's erroneous ruling that the parties' employment contract was unenforceable where granting a new trial placed plaintiff in an improved position.

**7. Attorney Fees— amount—findings not sufficient**

The trial court abused its discretion in the amount of attorney fees it awarded to plaintiff in an employment termination case where the court did not enumerate any findings as to counsel's skill or hourly rate or as to the nature and scope of the legal services rendered.

Appeal by plaintiff from orders entered 6 November 2008 by Judge Howard Manning and 13 November 2008, 16 March 2009, and 20 April 2009 by Judge Allen Baddour in Chatham County Superior Court. Heard in the Court of Appeals 25 March 2010.

*Lewis Phillips Hinkle, PLLC, by Brian C. Johnston and Elliot I. Brady, for plaintiff-appellant.*

*Wilson & Reives, PLLC, by Antwoine L. Edwards, for defendants-appellees.*

JACKSON, Judge.

Jerrian O. Lockett ("plaintiff") appeals the trial court's 6 November 2008 order, which granted summary judgment in favor of defendant Rosa S. Lockett ("Lockett") as to his breach of contract claim; 13 November 2008 order, which granted summary judgment in favor of Lockett as to the claim pursuant to the North Carolina Wage and Hour Act; 16 March 2009 orders, which directed verdict in favor of defendant Sister-2-Sister Solutions, Inc. ("Sister-2-Sister"), dismissed plaintiff's breach of contract claim, and awarded attorneys' fees to plaintiff; and 20 April 2009 order, which denied plaintiff's motion to amend judgment. For the reasons stated herein, we affirm in part, reverse in part, and remand in part.

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Plaintiff and Lockett were husband and wife when this action commenced. Lockett and her sister formed Sister-2-Sister in 2000 or 2001, and Lockett directed the day-to-day business of Sister-2-Sister throughout its lifetime. Lockett's sister left Sister-2-Sister in 2002 or 2003. Plaintiff had been employed by Sister-2-Sister at various times prior to the summer of 2006.

During the summer of 2006, plaintiff and Lockett negotiated the terms of an employment contract ("the contract") so that plaintiff would return to North Carolina from his job in Texas. The contract provided, in part, that it could be terminated only for cause: "[Plaintiff] will not be dismissed from Sister 2 Sister One Transportation unless contract has been broken, or not [ful]filling his duty as indicated above." Plaintiff alleges that on or about 31 July 2007, Sister-2-Sister terminated plaintiff's employment and that, at that point, plaintiff had not been paid for work he had performed during July 2007.

On 11 January 2008, plaintiff filed his complaint against Sister-2-Sister and Lockett ("defendants"), alleging breach of contract and violation of the North Carolina Wage and Hour Act ("Wage and Hour Act"). As part of his complaint, plaintiff alleged that Sister-2-Sister "has no independent identity apart from . . . Lockett," and the trial court, therefore, should "pierce the corporate veil and treat [Sister-2-Sister] as the alter ego of . . . Lockett."

On or about 17 October 2008, defendants moved for partial summary judgment as to plaintiff's breach of contract claim. At the 30 October 2008 hearing on the motion, plaintiff attempted to introduce deposition testimony from Lockett, but the trial court would not receive it. On 6 November 2008, the trial court granted the motion as to Lockett and denied it as to Sister-2-Sister, concluding, *inter alia*, that plaintiff and Sister-2-Sister "entered into an enforceable contract for employment on or about August 9, 2006[,] which contract provided that plaintiff could only be terminated for cause." Lockett then moved for summary judgment as to plaintiff's claim based upon the Wage and Hour Act, and on 13 November 2008, the trial court granted her motion and dismissed her from the action.

At the close of plaintiff's evidence during the 26 February 2009 trial, Sister-2-Sister moved for a directed verdict. On 16 March 2009, the trial court entered a directed verdict in favor of Sister-2-Sister and dismissed plaintiff's breach of contract claim, concluding, *inter alia*,

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Pursuant to the holding of the Court of Appeals in *Freeman v. Hardee's Food Systems, Inc.*, 3 N.C. App. 435, 165 S.E.2d 39 (1969), among other cases, the August 10, 2006 employment contract executed by plaintiff and [Sister-2-Sister] is not an enforceable employment contract, and plaintiff's employment with [Sister-2-Sister] was terminable at the will of either party.

On the same date, the trial court entered judgment in favor of plaintiff as to his claim pursuant to the Wage and Hour Act. The trial court awarded plaintiff \$840.00 for unpaid wages, \$840.00 for liquidated damages, \$7,500.00 for reasonable attorneys' fees, and \$344.00 for costs for filing and service fees. On 26 March 2009, plaintiff moved for amendment of judgment, which was denied on 20 April 2009. Plaintiff now appeals the trial court's 6 November 2008, 13 November 2008, 16 March 2009, and 20 April 2009 orders.

[1] Plaintiff first argues that the trial court erred by granting summary judgment in favor of Lockett as to the breach of contract claim, because there exists a genuine issue of material fact as to her individual liability for breach of contract. We disagree.

We review a trial court's grant of summary judgment *de novo*. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004)).

"Summary judgment is appropriate when 'there is no genuine issue as to any material fact' and 'any party is entitled to a judgment as a matter of law.' " *Id.* (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005)). We previously have explained,

"The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.

. . . .

Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial."

*Wilkins v. Safran*, 185 N.C. App. 668, 672, 649 S.E.2d 658, 661 (2007) (quoting *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003), *aff'd*, 358 N.C. 131, 591 S.E.2d 521 (2004) (per curiam)).

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When a motion for summary judgment is made and supported as provided in this rule, *an adverse party may not rest upon the mere allegations or denials of his pleading*, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2007) (emphasis added).

Here, defendants filed portions of plaintiff's deposition, an affidavit from the chairman of the Board of Directors for Sister-2-Sister, Sister-2-Sister's bylaws, and a memorandum of law in support of their motion for partial summary judgment. However, no evidence from plaintiff in opposition to the motion appears in the record. During the hearing on the motion, the trial court asked plaintiff's counsel, "What about the argument . . . that defendant makes that [Lockett] should not be a party to this case?" Plaintiff's counsel responded,

Well, Your Honor, I—I think that question—if you—if you look at our complaint here, paragraphs 4, 5, 6, and 7, I have alleged that the [trial] [c]ourt should pierce the corporate veil and hold defendant Rosa Lockett individually liable for the acts of the corporation. And certainly I think that the inquiry as to whether or not the [trial] [c]ourt should pierce the corporate veil is a fact question. And there is—there is absolutely material facts in question on whether or not it's appropriate to pierce the corporate veil here. And I haven't seen any case law in defendant's brief to the contrary that—that there is no basis to—to pierce the corporate veil in this case. So I—I think, Your Honor, that's a fact question and absolutely inappropriate for a summary judgment.

Plaintiff relies solely upon the allegations of alter ego within his complaint, which contravenes the standards set forth in North Carolina General Statutes, section 1A-1, Rule 56(e). Defendants provided evidence that Lockett was acting within the authority vested in her by Sister-2-Sister when she terminated plaintiff's employment, and in response, plaintiff did not "produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Wilkins*, 185 N.C. App. at 672, 649 S.E.2d at 661 (quoting *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003), *aff'd*, 358 N.C. 131, 591 S.E.2d 521 (2004) (per curiam)).

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[2] As part of his first argument, plaintiff also contends that Lockett's deposition testimony—which plaintiff's counsel proffered to the trial court during the summary judgment hearing—should have been considered prior to the trial court's ruling upon the motion. Although we agree with plaintiff's argument, he was not prejudiced by the trial court's decision not to review Lockett's deposition testimony.

Initially we note that the trial court was required to review all of the evidence properly presented to it prior to ruling upon a motion for summary judgment. *See Schneider v. Brunk*, 72 N.C. App. 560, 564, 324 S.E.2d 922, 925 (1985) ("The trial court must consider all papers before it, including the pleadings and any depositions.") (citing *Estrada v. Jaques*, 70 N.C. App. 627, 643, 321 S.E.2d 240, 251 (1984)). Even though a trial court may exclude from its consideration an untimely affidavit, N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007) ("If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may . . . proceed with the matter without considering the untimely served affidavit[.]"), this rule does not apply to the introduction of other evidence such as depositions, *Pierson v. Cumberland County Civic Ctr. Comm'n*, 141 N.C. App. 628, 635, 540 S.E.2d 810, 815 (2000) ("Rule 56(c) does not specify that these other forms of evidence [pleadings, depositions, answers to interrogatories, and admissions on file] be presented at any particular time, much less prior to the hearing. Therefore, we have no basis to conclude that plaintiffs [by first offering certain evidence when the summary judgment hearing was underway] violated the mandates of Rule 56(c)[.]"). Therefore, the trial court should have reviewed Lockett's deposition—which plaintiff attempted to introduce during the course of the hearing—prior to ruling upon defendants' motion for summary judgment.

Nonetheless, in the case *sub judice*, the trial court's error did not prejudice plaintiff, because plaintiff did not attempt to introduce the evidence—specifically, the depositions of the members of Sister-2-Sister's Board of Directors—that he now contends would create a genuine issue of material fact as to Lockett's individual liability. In his brief, plaintiff argues that the depositions of the members of Sister-2-Sister's Board of Directors

show[] that the Board had no first-hand knowledge of the allegations made by Rosa Lockett regarding [p]laintiff's performance of his duties and voted to terminate [p]laintiff's employment with Sister-2-Sister based solely upon her recommendations. The

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deposition testimony also shows that the Board conducted no independent investigation of the allegations of Rosa Lockett and made no effort whatsoever to verify the substance thereof.

(Internal citations omitted). Although plaintiff contends that the “deposition testimony offered to the trial court at the 30 October 2008 hearing in opposition to [d]efendants’ [m]otion . . . was that of Rosa Lockett and the members of the Board of Directors of Sister-2-Sister[,]” the trial transcript discloses that he offered only Lockett’s deposition.

Plaintiff offered Lockett’s deposition to the trial court twice during the summary judgment hearing. The first time, plaintiff’s counsel stated,

As I understand defendant’s argument is is that the contract itself, taking apart whether or not my client did duties number 1 through 7, whether or not this is a valid contract because it doesn’t have, as defendant’s counsel argues, a definite period. I do have a copy of defendant Rosa Lockett’s deposition testimony that I think is—may I approach?

The trial court then declined to accept the proffered deposition. Later in the hearing, plaintiff’s counsel again offered the deposition, stating,

And if the [c]ourt is at all inclined to look at the client or the parties’ intentions as to this agreement, I believe the [c]ourt has to take a look at the defendant, Rosa Lockett’s, deposition testimony because she clearly states that not only was there—clearly the only reason [plaintiff] could have been terminated was for his failure to perform the exact seven duties that are set forth in the contract. And if Your Honor would like to review it, I can hand up a copy of the relevant portions of the deposition testimony.

The trial court proceeded directly to making its ruling without addressing plaintiff’s offer of evidence. Not only did plaintiff fail to argue that Lockett’s deposition supported a genuine issue of material fact as to her individual liability pursuant to the contract, focusing instead upon its support of the contract’s enforceability, but he also failed to offer depositions from any of the board members which he now contends would support the denial of defendants’ motion for partial summary judgment.

Because plaintiff did not attempt to introduce evidence that may have created a genuine issue of material fact as to Lockett’s individual liability and instead, relied upon “the mere allegations . . . of his

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pleading,” N.C. Gen. Stat. § 1A-1, Rule 56(e) (2007), there existed no genuine issue of material fact as to Lockett’s individual liability based upon the evidence before the trial court. Accordingly, the trial court did not err in granting Lockett’s motion for partial summary judgment as to plaintiff’s breach of contract claim.

**[3]** Second, plaintiff contends that the trial court erred by granting summary judgment in favor of Lockett as to the claim pursuant to the Wage and Hour Act, because there exists a genuine issue of material fact as to her individual liability pursuant to the Wage and Hour Act. Based upon our holding, *supra*, that plaintiff did not offer evidence to support the existence of a genuine issue of material fact as to Lockett’s individual liability, we also hold that the trial court did not err in granting summary judgment in favor of Lockett as to plaintiff’s claim pursuant to the Wage and Hour Act.

**[4]** Plaintiff’s third contention is that the trial court erred by directing verdict in favor of Sister-2-Sister and dismissing plaintiff’s claim for breach of contract. We agree.

We review a trial court’s ruling upon a motion for directed verdict *de novo*. *Austin v. Bald II, L.L.C.*, 189 N.C. App. 338, 342, 658 S.E.2d 1, 4 (citing *Denson v. Richmond Cty.*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003)), *disc. rev. denied*, 362 N.C. 469, 665 S.E.2d 737 (2008).

This Court previously has held:

It is well-established “that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another’s errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action. Although an exception has been established for orders that do not resolve an issue but direct some further proceeding prior to a final ruling, “when the [trial] judge rules as a matter of law, not acting in his discretion, the ruling finally determines the rights of the parties unless reversed upon appellate review.”

*Cail v. Cerwin*, 185 N.C. App. 176, 181, 648 S.E. 2d 510, 514 (2007) (internal citations omitted) (alteration in original).

We also have held that

a trial judge has the power to modify or change an interlocutory order “where (1) the order was discretionary, and (2)

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there has been a change of circumstances.” *Stone v. Martin*, 69 N.C. App. 650, 652, 318 S.E. 2d 108, 110 (1984); *see also State v. Duvall*, 304 N.C. 557, 562-63, 284 S.E. 2d 495, 499 (1981) (judge can overrule a denial of a motion for special jury venire, a discretionary motion, previously entered by another judge if “new evidence” is presented).

*Iverson v. TM One, Inc.*, 92 N.C. App. 161, 164, 374 S.E.2d 160, 162-63 (1988). “[T]he denial of a motion for summary judgment is an interlocutory order[.]” *Id.* at 164, 374 S.E.2d at 163.

In the case *sub judice*, the 6 November 2008 and 16 March 2009 orders both found as fact that the contract at issue, on its face, was for an undefined period of time. They both also found that the contract provided that plaintiff’s employment could be terminated only for cause. Additional findings in the two orders related only to the identity of the parties and none mentioned or alluded to witness testimony. However, the two trial courts came to mutually exclusive conclusions of law based upon these findings.

On 6 November 2008, the trial court concluded as a matter of law that plaintiff and Sister-2-Sister “entered into an enforceable contract for employment on or about August 9, 2006[,] which contract provided that plaintiff could only be terminated for cause.” Based upon our case law, another trial court was not free to conclude, as of 16 March 2009, that

[p]ursuant to the holding of the Court of Appeals in *Freeman v. Hardee's Food Systems, Inc.*, 3 N.C. App. 435, 165 S.E.2d 39 (1969), among other cases, the August 10, 2006 employment contract executed by plaintiff and [Sister-2-Sister] is not an enforceable employment contract, and plaintiff's employment with [Sister-2-Sister] was terminable at the will of either party.

Accordingly, the trial court erred in directing verdict in favor of Sister-2-Sister and dismissing plaintiff’s breach of contract claim, because both judgments were based upon its conclusion that the contract at issue was legally unenforceable—a conclusion that it was not free to make, in light of the 6 November 2008 order that specifically had concluded that the contract was enforceable.<sup>1</sup>

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1. Defendant points us to the case of *Edwards v. Northwestern Bank*, 53 N.C. App. 492, 495, 281 S.E.2d 86, 88 (“[T]he earlier denial of a motion for summary judgment should not, in any way, be considered a barrier to later consideration of a motion for directed verdict.’”) (alteration in original) (citation omitted), *disc. rev. denied*, 304

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**[5]** Sister-2-Sister contends that the second trial court “had the benefit of hearing actual evidence in the case” and therefore, properly could reconsider the conclusion of law reached by the first trial court. This argument fails. First, Sister-2-Sister’s purported new evidence is “witness testimony regarding the enforceability of the parties’ employment agreement.” Both trial courts, however, made their conclusions based upon the law and the face of the contract, and witness testimony as to an individual’s intentions or understanding of the contract’s enforceability affects neither the law nor the face of the contract. Furthermore, even if the first trial court had erred in making its legal conclusion that the contract is enforceable, our case law clearly provides that “one Superior Court judge may not correct another’s errors of law[.]” *Cail*, 185 N.C. App. at 181, 648 S.E.2d at 514 (internal citation omitted).

**[6]** Sister-2-Sister also argues that, even if the trial court erred in its 16 March 2009 order, the error was not prejudicial and should not result in a new trial. According to Sister-2-Sister, “any reversal or grant of a new trial would not place [p]laintiff in a better position as his claim for breach of contract is not recognized under any of the exceptions to the at-will doctrine.” We disagree.

Our Rules of Civil Procedure provide that “no error or defect in any ruling or order . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right.” N.C. Gen. Stat. § 1A-1, Rule 61 (2005). In order for us to grant a request for a new trial, “[t]here must be a reasonable prospect of placing the party who asks for a new trial in a better position than the one which he occupies by the verdict.” *Rierson v. Iron Co.*, 184 N.C. 363, 369, 114 S.E. 467, 470 (1922). “If he obtains a new trial he must incur additional expense, and if there is no corresponding benefit he is still the sufferer.” *Id.*

In support of its argument, Sister-2-Sister primarily relies upon our Supreme Court’s decision in *Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 493 S.E.2d 420 (1997), *reh’g denied*, 347 N.C. 586, 502 S.E.2d 594 (1998), which noted three exceptions to

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N.C. 389, 285 S.E.2d 831 (1981). However, that quotation from *Edwards*, in context, merely emphasizes that motions for summary judgment and directed verdict differ as to the legal standards applied and the burdens placed upon the parties. It does not support the contention that one trial court’s conclusion of law, based upon the same findings of fact, can be overruled by a second trial court.

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our state's presumption of employment-at-will: (1) "parties can remove the at-will presumption by specifying a definite period of employment contractually[,]" (2) "federal and state statutes have created exceptions prohibiting employers from discharging employees based on impermissible considerations such as the employee's age, race, sex, religion, national origin, or disability, or in retaliation for filing certain claims against the employer[,]" and (3) "this Court has recognized a public-policy exception to the employment-at-will rule." *Id.* at 331, 493 S.E.2d at 422 (citations omitted). However, other cases appear to refer interchangeably to employment for a definite period of time and employment that is terminable only for cause when determining whether a contract is subject to the presumption of at-will employment. See e.g. *Wuchte v. McNeil*, 130 N.C. App. 738, 740, 505 S.E.2d 142, 144 (1998) ("An employee is presumed to be an employee-at-will absent a definite term of employment or a condition that the employee can be fired only 'for cause.' ") (citation omitted); *Houpe v. City of Statesville*, 128 N.C. App. 334, 344, 497 S.E.2d 82, 89 ("A viable claim for breach of an employment contract must allege the existence of contractual terms regarding the duration or means of terminating employment.") (citing *Tatum v. Brown*, 29 N.C. App. 504, 505, 224 S.E.2d 698, 699 (1976)), *disc. rev. denied*, 348 N.C. 72, 505 S.E.2d 871 (1998); *Mortensen v. Magneti Marelli U.S.A.*, 122 N.C. App. 486, 489, 470 S.E.2d 354, 356 ("The terms of the employment agreement do not expressly state, or imply, that the employment was to be permanent or that the plaintiff could be discharged only for cause. It thus follows that the relationship between the plaintiff and the defendant was terminable at the will of either party for any reason . . . ."), *disc. rev. denied*, 344 N.C. 438, 476 S.E.2d 120 (1996).

Even the *Kurtzman* Court held that the circumstances of that case "[did] not constitute additional consideration making what is otherwise an at-will employment relationship one that can be terminated by the employer only for cause." 347 N.C. at 334, 493 S.E.2d at 424. The implication, then, is that an employment relationship "that can be terminated by the employer only for cause" would succeed in removing an employment contract from the presumption of at-will employment. The *Kurtzman* Court also specifically rejected the notion "that the establishment of 'a definite term of service' is the sole means of contractually removing the at-will presumption." *Id.* Accordingly, we hold that the trial court's error in ruling that the parties' contract is unenforceable was prejudicial and that our granting plaintiff a new trial does place him in a better position than his current one.

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[7] Fourth, plaintiff argues that the trial court erred by entering an award of attorneys' fees in his favor in the amount of \$7,500.00. We agree.

We review a trial court's award of attorneys' fees pursuant to an abuse of discretion standard. *Hillman v. United States Liability Ins. Co.*, 59 N.C. App. 145, 155, 296 S.E.2d 302, 309 (1982) (citations omitted).

"Before awarding attorney's fees, the trial court must make specific findings of fact concerning: (1) the lawyer's skill; (2) the lawyer's hourly rate; and (3) the nature and scope of the legal services rendered." *Williams v. New Hope Found., Inc.*, 192 N.C. App. 528, 530, 665 S.E.2d 586, 588 (2008) (citing *In re Baby Boy Scearce*, 81 N.C. App. 662, 663-64, 345 S.E.2d 411, 413, *disc. rev. denied*, 318 N.C. 415, 349 S.E.2d 590 (1986)).

In the instant case, the trial court made only one finding of fact with respect to an award of attorneys' fees: "Plaintiff incurred reasonable attorney's fees in the amount of SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500) in connection with the preparation, filing, and prosecution of his North Carolina Wage and Hour Act claim." As Sister-2-Sister emphasizes, the trial court was not required to adhere to "[p]laintiff counsel's own estimation of the value of counsel's services or the alleged amount of time spent proving that [p]laintiff was not paid for several days during July 2007." However, the trial court *was* required to make sufficient findings detailing the reasonable basis for its award. *See id.* (citation omitted). The trial court may have awarded plaintiff a reasonable amount of attorneys' fees based upon plaintiff's counsel's work with respect to his prevailing claim, but because it did not enumerate any findings as to counsel's "skill" or "hourly rate" or as to "the nature and scope of the legal services rendered"—all three of which are required—*id.* (citation omitted), we hold that the trial court abused its discretion in its award of attorneys' fees to plaintiff.

Plaintiff's final argument is that the trial court erred in denying his motion for amendment of judgment because he had presented the trial court with ample evidence supporting the motion. Based upon our discussion of plaintiff's third argument *supra*, we hold that the trial court erred by denying plaintiff's motion to amend judgment.

Wehold that the trial court did not err in granting summary judgment in favor of Lockett as to plaintiff's claims of breach of contract and violations of the North Carolina Wage and Hour Act.

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However, we reverse as to the trial court's directed verdict in favor of Sister-2-Sister and dismissal of plaintiff's breach of contract claim. We also remand the issue of the amount of plaintiff's attorneys' fees to the trial court for entry of the requisite findings of fact.

Affirmed in part, reversed in part, and remanded in part.

Judges ELMORE and STROUD concur.

Judge JACKSON concurred prior to December 31, 2010.

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STATE OF NORTH CAROLINA v. TONIA KERRIN, DEFENDANT

No. COA09-1153

(Filed 4 January 2011)

**1. Probation and Parole— driver's license forfeiture—findings of fact—written order**

The trial court did not err in a probation revocation proceeding by making findings of fact and entry of judgment in a written order on form AOC-CR-317. N.C.G.S. § 15A-1331A did not require the trial court to announce its judgment in open court in addition to entry of a written order and the trial court was not required to announce all of the findings and details of its judgment in open court.

**2. Probation and Parole— driver's license forfeiture—insufficient findings of fact—matter remanded**

The trial court erred in a probation revocation proceeding by ordering the forfeiture of defendant's driver's license where the trial court failed to make the findings of fact required by N.C.G.S. § 15A-1331A(b)(2) to support the order. The order did not include a finding concerning whether defendant failed to make reasonable efforts to comply with the conditions of probation. As there was evidence in the record from which the trial court could have made this finding, the matter was remanded to the trial court.

**3. Probation and Parole— order—remanded—clerical correction**

The Court of Appeals remanded an order revoking defendant's probation for correction of clerical errors.

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**4. Probation and Parole— driver’s license forfeiture—term not to exceed original probation term**

The trial court committed reversible error by suspending defendant’s driver’s license for 24 months from the date of her probation revocation hearing when only 6 ½ months of her probationary period remained. A court which revokes a defendant’s probation may order a forfeiture of an individual’s driver’s license pursuant to N.C.G.S. § 15A-1331A(b)(2) at any time during the individual’s probation term, but the specific term of forfeiture cannot exceed the individual’s original probation term as set by the sentencing court at the time of conviction.

Appeal by defendant from judgment entered on or about 1 April 2009 by Judge Phyllis M. Gorham in Superior Court, New Hanover County. Heard in the Court of Appeals 11 March 2010.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Karissa J. Davan, for the State.*

*Faith S. Bushnaq, for defendant-appellant.*

STROUD, Judge.

Tonia Kerrin (“defendant”) appeals from a trial court’s probation violation order and order of forfeiture of her driver’s license for a period of 24 months. Because the trial court did not make the findings of fact required by N.C. Gen. Stat. § 15A-1331A that defendant failed to make “reasonable efforts” to comply with the conditions of her probation and the term of defendant’s forfeiture exceeded the statutory limits for license forfeiture, we reverse the trial court’s order of forfeiture and remand for further findings. We also remand for correction of a clerical error.

### I. Background

On 8 January 2007, defendant was indicted on one count of conspiracy to commit felony larceny and on 15 May 2007 defendant was arrested for one count of assault on a government official during an alleged shoplifting incident in Wake County. On 15 October 2007, pursuant to a plea agreement, defendant pled guilty to one count of felony larceny, one count of conspiracy to commit felony larceny, and one count of assault on a government official. The trial court sentenced defendant to concurrent active terms of 10 to 12 months of imprisonment for the felony larceny conviction and 8 to 10 months of

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imprisonment for the consolidated conspiracy and assault convictions. The trial court suspended the active terms of imprisonment and placed defendant on supervised probation for a period of 24 months, with 6 months designated as intensive probation. Defendant's probation was transferred from Wake County to New Hanover County.

On 30 September 2008, Probation Officer Mark Pittman filed a probation violation report alleging that defendant had violated the conditions of her probation in that she had a positive drug test for use of cocaine, failed to complete community service, did not report as scheduled on two dates, and was not at her approved residence at curfew on three dates. An order for defendant's arrest was issued on 31 October 2008 but was recalled on 13 November 2008. Another order for defendant's arrest was issued on 8 January 2009 for failure to report for a probation hearing on 5 January 2009. Probation Officer Pittman filed another probation violation report on 13 February 2009 alleging that defendant failed to appear for a probation violation hearing, left her approved residence, failed to make her whereabouts known, and had "absconded supervision."

On 1 April 2009, following a probation revocation hearing, the trial court entered judgment against defendant and concluded that she had violated the conditions of her probation based upon the four violations alleged in the "Violation Report or Notice dated 10/20/08"<sup>1</sup>, revoked her probation, and activated defendant's sentence of 8 to 10 months. The trial court also ordered that defendant's driver's licensing privileges be forfeited for 24 months, beginning on 1 April 2009, the date of the probation revocation hearing, until 1 April 2011. Defendant gave written notice of appeal.

**II. Findings required by N.C. Gen. Stat. § 15A-1331A**

**[1]** Defendant makes two arguments regarding deficiencies in the findings in the forfeiture order. First, defendant contends that "the trial court committed reversible error in entering a written judgment ordering license forfeiture when the judgment announced in open court was silent as to forfeiture." Defendant contends that since N.C. Gen. Stat. § 15A-1331A requires the trial court to make findings in the judgment and the trial judge was silent as to forfeiture in open court, the case should be remanded to trial court for entry of judgment consistent with the trial court's statements in open court and the

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1. The probation violation report was actually dated 30 September 2008; on that report, defendant's probation violation hearing was set for 20 October 2008, although the hearing did not occur on that date.

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forfeiture order should be vacated. The State counters that proper findings were made in the trial court's written order.

N.C. Gen. Stat. § 15A-1331A(b)(2) (2009) requires forfeiture will occur based upon the trial court's "findings in the judgment that the individual failed to make reasonable efforts to comply with the conditions of probation." In addition, subsection (c) states,

Whenever an individual's licensing privileges are forfeited under this section, the judge shall make findings in the judgment of the licensing privileges held by the individual known to the court at that time, the drivers license number and social security number of the individual, and the beginning and ending date of the period of time of the forfeiture . . . .

N.C. Gen. Stat. § 15A-1331A(c).

Contrary to defendant's contentions, we have held that "[i]n a criminal case, for entry of judgment to occur, a judge must either announce his ruling in open court or sign the judgment containing the ruling and file it with the clerk." *N.C. Dep't of Corr. v. Brunson*, 152 N.C. App. 430, 437, 567 S.E.2d 416, 421 (2002) (citing *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984)). Therefore, the trial court was not required to announce all of the findings and details of its judgment in open court. We also note that nothing in N.C. Gen. Stat. § 15A-1331A requires the trial court to announce its judgment in open court in addition to entry of a written order. Accordingly, we hold that the trial court did not err by making findings and entry of judgment in a written order on form AOC-CR-317 titled, "FORFEITURE OF LICENSING PRIVILEGES FELONY PROBATION REVOCATION[.]". We therefore reject defendant's argument that the written order is in error because the trial court did not announce the details of the order in open court.

**[2]** Defendant's second argument is that the trial court failed even in its written order to make the findings of fact required to support an order of forfeiture. Defendant notes that the order does not include the finding required by N.C. Gen. Stat. § 15A-1331A(b)(2) that "the individual failed to make reasonable efforts to comply with the conditions of probation."<sup>2</sup> Defendant contends that N.C. Gen. Stat.

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2. Although plaintiff has not made any argument regarding the absence of findings as to "the drivers license number and social security number of the individual," we note that N.C. Gen. Stat. § 15A-1331A(c) provides that the trial court "shall" make these findings; the order does not contain these findings. We also question the wisdom of requiring a defendant's full social security number to be listed on a judgment which

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§ 15A-1331A provides that license forfeiture does not automatically occur upon any revocation of probation, but the trial court must also find that the defendant “failed to make reasonable efforts to comply with the conditions of probation” for forfeiture to take effect. Thus, defendant contends that the trial court’s findings of fact do not support its conclusion of law that defendant was subject to license forfeiture.

We must first determine what findings of fact and conclusions of law the trial court made; this determination is complicated by the fact that the order of forfeiture incorporates the judgment of probation revocation, which in turn incorporates the probation violation report. We must look to all three documents to piece together the findings. The order of forfeiture itself includes the following findings of fact:

On the basis of the record in this case and any evidence presented, the Court, having entered the attached judgment, which is incorporated by reference, makes the following further findings and includes these findings in the judgment. The judgment is modified to the extent necessary to include these findings, but the inclusion of these findings does not otherwise alter, amend, or modify the judgment in any respect. The Court FINDS that the defendant holds a licensing privilege issued by each of the licensing agencies named below, has been convicted of a felony and is subject to forfeiture of those licensing privileges because: . . .

**2. (*Structured Sentencing felonies committed on and after January 1, 1997*)** the defendant’s probation was revoked or suspended. The period of license forfeiture begins on the “Beginning Date” shown above and ends on the “Ending Date” shown above.

The “Beginning Date” entered on the order was “04-01-2009” and the “Ending Date” entered on the order was “04-01-2011[.]” The form which was used for the order, AOC-CR-317 (revised 06/04), also includes a note as follows: “*NOTE: The “Beginning Date” is the date of the entry of this judgment, and the “Ending Date” is the date of the end of the full probationary term imposed at the time of conviction.*” (Emphasis in original.) The “licensing agencies named below” blank on the form was filled in as the “North Carolina Division of Motor Vehicles[.]” The blanks for the defendant’s drivers license number and social security number were not filled in.

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is a matter of public record, given the recent increases in identity theft and fraudulent use of social security numbers.

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The “attached judgment” referred to in the forfeiture order is the probation revocation order entered on the same date. That order included the following findings of fact:

After considering the record contained in the files numbered above, together with the evidence presented by the parties and the statements made on behalf of the State and the defendant, the Court finds:

1. The defendant is charged with having violated specified conditions of the defendant's probation as alleged in the . . . a. Violation Report(s) on file herein, which is incorporated by reference . . .
2. Upon due notice or waiver of notice . . . a. a hearing was held before the Court and, by the evidence presented, the Court is reasonably satisfied in its discretion that the defendant violated each of the conditions of the defendant's probation as set forth below . . .
3. The condition(s) violated and the facts of each violation are as set forth . . . a. in paragraph(s) 1,2,3,4 in the Violation Report or Notice dated 10-20-08 [sic].

The probation violation report of 10-20-08<sup>3</sup> which was incorporated identified four probation violations, specifically:

1. Special Condition of Probation “Not use, possess or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it . . .” in that

THAT ON 08-28-09, THE DEFENDANT DID TEST POSITIVE FOR THE ILLEGAL SUBSTANCE OF COCAINE.

2. Special Condition of Probation “Complete Community Service as directed by the Community Service Coordinator . . .” in that THE DEFENDANT FAILED TO COMPLETE COMMUNITY SERVICE AS AGREED AND IS 50 HOURS IN ARREARS.

3. Regular Condition of Probation “Report as directed by the Court or the probation officer to the officer at reasonable times and places . . .” in that

THAT ON 09-17-08 AND 08-27-08, THE DEFENDANT FAILED TO

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3. As noted above, this date is in error; the probation violation report was dated 30 September 2008.

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REPORT AS SCHEDULED AND FAILED TO CALL PRIOR TO MISSING THESE[] APPOINTMENTS TO MAKE OTHER ARRANGEMENTS.

4. Special Condition of Probation “Not be away from the defendant’s residence during the specified hours as set by the court or probation officer . . .” in that

THAT ON 08-23-08 AT 7 PM, 08-15-08 AT 8:14PM, AND 08-11-08 AT 8:32PM., THE DEFENDANT WAS NOT AT HER APPROVED RESIDENCE AS REQUIRED BY CURFEW.

Defendant is correct that the trial court failed to make any finding of fact that she “failed to make reasonable efforts to comply with the conditions of probation.” *See* N.C. Gen. Stat. § 15A-1331A(b)(2). None of the three documents which comprise the order make any mention of “reasonable efforts” or lack thereof. The only substantive findings of fact were that defendant violated four specific conditions of her probation; these findings were required to support the probation revocation order, but no additional findings were made other than the fact that she had a license issued by the North Carolina Department of Motor Vehicles which was subject to forfeiture.

Although the trial court failed to make the required findings of fact, if there was evidence upon which the trial court could have made these findings, it would be proper for us to remand to the trial court for entry of additional findings. *See State v. King*, — N.C. App. —, 693 S.E.2d 168 (2011) (Remand for additional findings of fact as to satellite based monitoring determination to trial court, where the State presented evidence at the probation violation hearing which would support required findings of fact). Therefore, we must next consider whether the State presented any evidence before the trial court which could support a finding that defendant “failed to make reasonable efforts to comply with the conditions of probation” as to the probation violations upon which the revocation was predicated.

Defendant’s probation officer, Officer Pittman, and defendant testified at the 1 April 2009 probation revocation hearing regarding defendant’s compliance with the conditions of her probation. Officer Pittman testified that defendant had violated her probation by testing positive for cocaine on 28 August 2008; missing office appointments with Officer Pittman on 17 September 2008 and 27 August 2008; and failing to meet with Officer Pittman at her residence every two months. We note these were specific violations in Officer Pittman’s 30 September 2008 probation violation report. However, Officer Pittman

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testified that defendant had also violated her probation by failing to appear for her 6 January 2009 probation hearing and “absconding supervision[.]” This specific violation was in Officer Pittman’s 13 February 2009 violation report. Officer Pittman further testified that defendant had only made contact sporadically; had been charged with additional crimes since being placed on probation; had been incarcerated in Anson County; and had been released from incarceration in Anson County before her probation revocation hearing scheduled for 5 January 2009 but did not attend that hearing. He also stated that after defendant’s failure to appear, she contacted him by phone, but because she knew that there were probation warrants out for her arrest, she did not report to him or turn herself in; and she was arrested in late March 2009, as part of a police “sting.” Officer Pittman also testified that “[a]ccording to family,” defendant was “avoiding supervision by not making herself available.” Thus, it appears that the State presented evidence which supported the violations alleged in both the 13 February 2009 and 30 September 2008 probation violation reports, as well as evidence regarding defendant’s failure to exercise reasonable efforts to comply with the conditions of her probation as to both violation reports.

Our Court has recognized that “probation revocation hearings are not formal criminal proceedings requiring proof beyond a reasonable doubt” and that “the State’s burden of proof during probation revocation hearings is to present evidence that reasonably satisfies the trial court in its discretion that defendant has violated a valid condition of probation.” *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987). No prior case has addressed the burden of proof under N.C. Gen. Stat. § 15A-1331A, as to forfeiture of licensing privileges, but the same burden of proof would logically apply to this determination as to the revocation of probation. Thus, the State had a burden of proof to “present evidence that reasonably satisfies the trial court in its discretion[,]” *see id.*, that the defendant had not made “reasonable efforts” to comply with at least one condition of probation. The testimony by Officer Pittman shows that the State did present evidence regarding defendant’s lack of “reasonable efforts to comply with the conditions” of her probation. *See* N.C. Gen. Stat. § 15A-1331A(b)(2). The transcript also contains testimony from defendant as to her efforts to comply with the conditions of her probation. As the statute requires findings as to defendant’s reasonable efforts to comply with the conditions of her probation and there was evidence in the trial transcript regarding defendant’s efforts to comply with the conditions of probation, we reverse the trial court’s order forfeiting defendant’s

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license privileges for a period of 24 months and remand to the trial court for further findings as to whether defendant failed to “make reasonable efforts to comply with the conditions of probation.” *See* N.C. Gen. Stat. § 15A-1331A(b)(2).

We further note that form AOC-CR-317 does not contain a section specifically designated for the trial court to make findings as to defendant’s “reasonable efforts to comply with the conditions of probation[]” as required by N.C. Gen. Stat. § 15A-1331A(b)(2). We therefore encourage revision of form AOC-CR-317 to add this required finding, which may help to avoid future errors based upon omission of this finding in orders for forfeiture of a defendant’s licensing privileges.

**[3]** Additionally, we must address a clerical error in the trial court’s findings in its 1 April 2009 order revoking defendant’s probation. A clerical error has been defined by this Court as “[a]n error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.” *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (citation and quotation marks omitted). Here, as stated above, the only two probation violation reports filed by Officer Pittman were dated 30 September 2008 and 13 February 2009. However, in its written order revoking defendant’s probation, the trial court found that the conditions violated by defendant and the facts of each violation were set forth in paragraphs one through four of the violation report dated “10/20/2008[.]” Officer Pittman’s 30 September 2008 probation violation report states that the probation violation hearing date was scheduled for “10-20-2008[.]” Therefore, the entry of “10/20/2008” in the trial court’s order appears to have been “[a]n error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record.” *See id.* We also note that at the 1 April 2009 probation violation hearing, evidence was presented regarding defendant’s violations based upon both the 30 September 2008 and the 13 February 2009 probation violation reports. “When, on appeal, a clerical error is discovered in the trial court’s judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record ‘speak the truth.’ ” *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and quotation marks omitted). Accordingly, we remand to the trial court for correction of this clerical error, to correctly identify the probation violation report or reports and to make findings regarding the conditions which the trial court found that defendant had violated.

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**III. Defendant's term of license forfeiture**

[4] Defendant also argues on appeal that “the trial court committed reversible error by suspending [her] license for 24 months from the date of her probation revocation hearing when only 6 ½ months of her probationary period remained.” Even though we have reversed the order of forfeiture of defendant’s licensing privileges based on the lack of required findings of fact, the trial court on remand will make additional findings and may again order a term of forfeiture of defendant’s licensing privileges. Therefore, we will address defendant’s argument.

The relevant portions of N.C. Gen. Stat. § 15A-1331A state:

(b) Upon conviction of a felony, an individual automatically forfeits the individual’s licensing privileges *for the full term of the period the individual is placed on probation by the sentencing court at the time of conviction for the offense, if:*

(1) The individual is offered a suspended sentence on condition the individual accepts probation and the individual refuses probation, or

(2) The individual’s probation is revoked or suspended, and the judge makes findings in the judgment that the individual failed to make reasonable efforts to comply with the conditions of probation.

N.C. Gen. Stat. § 15A-1331A (Emphasis added).

The plain language of N.C. Gen. Stat. § 15A-1331A(b) sets forth a specific term for which a court can order forfeiture of an individual’s licensing privileges: “for the full term of the period the individual is placed on probation by the sentencing court at the time of conviction for the offense[.]” N.C. Gen. Stat. § 15A-1331A(b). The statute provides for the “sentencing court” to set a term of probation “at the time of conviction for the offense[.]” The term “conviction” clearly refers to the conviction for the offense(s) for which a defendant is placed on probation.

We have held that, under the traditional definition, “conviction” refers to the jury’s or fact-finder’s guilty verdict. *State v. McGee*, 175 N.C. App. 586, 589-90, 623 S.E.2d 782, 785, *disc. review denied*, 360 N.C. 489, 632 S.E.2d 768, *appeal dismissed*, *disc. review denied*, 360 N.C. 542, 634 S.E.2d 891 (2006) (adopting Black’s Law Dictionary’s definition of the term “conviction”: “The act or process of judicially finding someone guilty of a

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crime; the state of having been proved guilty . . . 2. The judgment (as by jury verdict) that a person is guilty of a crime.’ ”). *Id.* Likewise, the North Carolina Structured Sentencing Statutes provide, in pertinent part, “a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest.” N.C. Gen. Stat. § 15A-1331(b) (2007).

*State v. Delrosario*, 190 N.C. App. 797, 800-01, 661 S.E.2d 283, 286, *disc. review denied*, 362 N.C. 684, 670 S.E.2d 905 (2008). Because the statute specifies that the “sentencing court” sets the term of probation upon which the forfeiture is based “at the time of conviction[,]” it appears that the trial court at the probation revocation hearing does not have discretion to extend an individual’s forfeiture beyond the ending date of the individual’s term of probation as set at the time of conviction. The “sentencing court” here is clearly referring to the judge sentencing the individual for the original conviction and placing the defendant on probation, not a judge revoking an individual’s probation at a later date. *See* N.C. Gen. Stat. § 15A-1331A(b). The State argues that the “term of probation” which is set at the time of conviction refers only to the length of time set at the time of conviction, here 24 months, but that the starting date of the 24 months may begin at any time, including the date of revocation. According to the State’s proposed interpretation, the revoking court would have the discretion to order forfeiture for any period of time up to the maximum term as set at the time of conviction, but no more than that term, although the term would begin only upon revocation. However, the statutory language is simply too specific to support the State’s proposed interpretation. A court which revokes a defendant’s probation may order a forfeiture of an individual’s license pursuant to N.C. Gen. Stat. § 15A-1331A(b)(2) at any time during the individual’s probation term, but the specific term of forfeiture cannot exceed the individual’s original probation term as set by the “sentencing court” at the time of conviction. Accordingly, it appears that N.C. Gen. Stat. § 15A-1331A does not grant a trial court discretion to extend a defendant’s forfeiture of licensing privileges beyond the term of his or her original term of probation as set by the sentencing court at the time of his conviction.

Here, defendant was placed on 24 months probation by the sentencing court, starting on 15 December 2007, and ending on 15 December 2009. Defendant’s probation was revoked on 1 April 2009, approximately 8 months before defendant’s term of probation was set to expire. The trial court ordered defendant’s forfeiture of her license for 24 months from the date of revocation or until 1 April 2011. As this

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forfeiture term extends beyond defendant's original probation term as set "at the time of conviction" by the "sentencing court[,]" we hold that this forfeiture term was in error. Accordingly, we reverse the trial court's order as to the term of defendant's forfeiture. If the trial court on remand makes findings that defendant "failed to make reasonable efforts to comply with the conditions of probation[,]" *see* N.C. Gen. Stat. § 15A-1331A(b)(2), and orders forfeiture of defendant's licensing privileges, then the term of forfeiture cannot extend beyond 15 December 2009, the ending date of her original term of probation as set by the sentencing court at the time of her conviction.

In further examination of form AOC-CR-317, we note that it includes a suggestion to the trial court by its "*NOTE: The 'Beginning Date' is the date of the entry of this judgment, and the 'Ending Date' is the date of the end of the full probationary term imposed at the time of conviction.*" The State interprets this "NOTE" as meaning that the "Beginning Date" is the date of entry of "this judgment," normally the same date as the revocation of probation; this is correct. The State interprets the "Ending Date" as a date which is calculated by the revoking court (as opposed to the sentencing court) by adding the length of time of the original probationary period, here 24 months, to the "beginning date." Although we do not agree that form AOC-CR-317 means exactly what the State contends, we agree it is one reasonable interpretation of the rather cryptic "NOTE[.]". However, we believe the State's interpretation of the AOC form, and the statute, to be incorrect. We therefore encourage further revision of form AOC-CR-317 to clarify this issue and perhaps avoid future errors based upon misinterpretation of the form.

**IV. Conclusion**

Accordingly, we reverse the trial court's order of license forfeiture and remand for further findings.

**REVERSED AND REMANDED.**

Judges ELMORE and JACKSON concur.

Judge JACKSON concurred prior to 31 December 2010.

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STATE OF NORTH CAROLINA v. DON TRAY COLE

No. COA10-139

(Filed 4 January 2011)

**1. Indictment and Information— variance in underlying felony offense—subject matter jurisdiction—notice—accessory after the fact**

The trial court had subject matter jurisdiction to try defendant and enter judgment against him for accessory after the fact to second-degree murder even though the indictment listed the charge as accessory after the fact to first-degree murder. The indictment provided defendant with adequate notice to prepare his defense and to protect him from double jeopardy. The elements of the underlying felony themselves were not essential elements of the crime of accessory after the fact.

**2. Accomplices and Accessories— accessory after the fact—second-degree murder—motion to dismiss—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the charge of accessory after the fact to second-degree murder even though defendant contended there was insufficient evidence to show that he knew his nephew killed the victim. The totality of evidence gave rise to a reasonable inference for the jury to infer that defendant knew the close range shot was fatal.

**3. Accomplices and Accessories— accessory after the fact—armed robbery—motion to dismiss—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the charge of accessory after the fact to armed robbery even though defendant contended there was insufficient evidence to show that an unlawful taking or attempt to take had occurred. Contrary to defendant's assertion, the robbery was complete once the stolen property was removed from the victim's possession instead of when defendant arrived at a place of safety.

**4. Appeal and Error— preservation of issues—failure to raise constitutional issue at trial**

Although defendant contended that the trial court violated his constitutional guarantee against double jeopardy by convicting

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him of accessory after the fact to second-degree murder and armed robbery even though the two convictions were based on the same underlying facts, he failed to preserve this issue because he did not raise it at trial.

**5. Criminal Law— denial of requested jury instruction—not supported by evidence or law**

The trial court did not abuse its discretion in an accessory after the fact case by denying defendant's request to instruct the jury on "mere presence" and the meaning of "malice." The requested instructions were not supported by the evidence and were not appropriate under the law.

**6. Evidence— detective—opinion testimony—police investigative process—plain error analysis**

The trial court did not commit plain error in an accessory after the fact case by allegedly admitting improper opinion evidence from a detective. The testimony was rationally based on his perception and experience about police procedure. Further, the pertinent testimony was helpful to the fact finder to understand the investigative process.

**7. Evidence— prior crimes or bad acts—criminal record—plain error analysis**

The trial court did not commit plain error in an accessory after the fact case by admitting evidence referencing defendant's criminal record. Although the pertinent testimony was not admitted for one of the proper purposes under N.C.G.S. § 8C-1, Rule 404(b), it did not rise to the level of plain error since it was not offered to prove his character.

**8. Criminal Law— prosecutor's arguments—defendant's prior convictions—plain error analysis**

The trial court did not commit plain error in an accessory after the fact case by failing to intervene *ex mero motu* when the prosecutor referenced defendant's prior convictions during her closing statement. Viewed in the context in which they were made and in light of the overall factual circumstances to which they referred, the references did not so infect the trial that they rendered the conviction fundamentally unfair.

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Judge JACKSON concurred in opinion prior to 31 December 2010.

Appeal by defendant from judgments entered 18 June 2009 by Judge J.B. Allen, Jr., in Durham County Superior Court. Heard in the Court of Appeals 2 September 2010.

*Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.*

*Linda B. Weisel for defendant.*

ELMORE, Judge.

A jury found Don Tray Cole (defendant) guilty of accessory after the fact to second degree murder and accessory after the fact to robbery with a dangerous weapon. The trial court sentenced defendant to concurrent sentences of 107 to 138 months' imprisonment and thirty-four to forty-one months' imprisonment. Defendant now appeals. After careful consideration, we hold that defendant received a trial free from error.

### I. Background

During the evening of 10 June 2008, defendant and his nephew, Mark Stevens, drove to Liberty Street in Durham to purchase drugs. Defendant drove the vehicle, a Jeep, and Stevens rode in the front passenger seat. Stevens had a gun in the Jeep with him. According to Stevens, defendant knew that Stevens had the gun. Defendant and Stevens met the victim, Johnny Moore, Jr., in front of a house on Liberty Street to buy cocaine. Defendant backed the Jeep into the driveway of the house, and Stevens negotiated the sale with Moore while sitting in the Jeep. According to Stevens, while Moore was standing by the driver's side of the Jeep, Stevens pulled out his gun to scare Moore. Then Moore tried to smack the gun out of Stevens's hands, and the two men struggled over the gun. The gun went off while they were struggling. Stevens claimed that neither he nor defendant knew that Moore had been shot when they left the scene; Stevens did not see any blood, and Moore was still on his feet and able to run away from the vehicle.

A witness, Trindale Wilds, testified that he was smoking crack with Moore behind the house on Liberty Street when defendant and Stevens arrived. According to Wilds, Moore ran up to the Jeep, a scuffle ensued, the passenger fired a shot, and Moore ran away from the Jeep. Wilds did not see the bullet hit Moore, but he opined, "Close as

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[Moore] was, [Stevons] couldn't miss. Close as he was." Wilds heard defendant say, "Why you shoot him, man? That's Boogie, man. Why you shoot him?" Wilds described defendant's reaction as genuine shock; "he didn't know it was going down like that, he really didn't." However, defendant did not drive off immediately. He "stopped for a little while and then drove off."

After being shot, Moore ran down the street and around the back of the house on Liberty Street, where he collapsed on the back porch and died. According to the medical examiner, Moore was shot in the chest, and the bullet exited through his back. The bullet perforated the thoracic aorta, both lungs, both diaphragms, and the stomach. The medical examiner explained that, after being shot, "Moore would have bled quickly into his chest cavity. Also as the chest cavity is filled with blood, he cannot breath[e] in, he cannot expand his lungs anymore, because now where there should be just space that the lungs can expand, they can't, they fill up with blood so he can't breathe." She opined that he "probably" would have been alive for another three to five minutes after being shot. "During this time, . . . he may have well been conscious and breathing, but, again, with . . . the blood filling the chest cavity, he wouldn't have been able to breath[e] for a long time."

Witnesses identified defendant and Stevens to police at the scene. Defendant was arrested that evening, but Stevens evaded capture for several weeks. Defendant cooperated with police during the investigation. Police testified that defendant said that he did not know that Stevens was going to shoot Moore or why Stevens shot Moore. He told police that, after the shooting, he drove to his father's house in Durham. Defendant stayed with his father and Stevens took off through the woods shortly before police arrived.

Stevens was charged with first degree murder and armed robbery, but he pled guilty to second degree murder and armed robbery. Defendant was indicted for first degree murder, robbery with a dangerous weapon, accessory after the fact to first degree murder, and accessory after the fact to robbery with a dangerous weapon. The State proceeded to trial on all four charges, but, at the close of all of the evidence, the trial court dismissed the murder and armed robbery charges. However, the trial court charged the jury with determining whether defendant was guilty of being an accessory after the fact to second degree murder, rather than first degree murder. The jury found defendant guilty of being both an accessory to second degree

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murder and an accessory to robbery with a dangerous weapon. Defendant now appeals.

**II. Arguments****A. Subject Matter Jurisdiction**

[1] Defendant argues that the trial court lacked subject matter jurisdiction to try him and to enter judgment against him for accessory after the fact to second degree murder because the indictment listed the charge as accessory after the fact to first degree murder. We disagree.

The indictment, presumably drafted before Stevens pled guilty to second degree murder, contained the following relevant language:

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above, the defendant named above unlawfully, willfully and feloniously did become an accessory after the fact to the felony of first degree Murder (GS 14-17) that was committed by Mark Stevens against Johnny Moore, in that the defendant knowing that Mark Stevens had committed a Murder in the first degree, did knowingly assist Mark Stevens in attempting to escape and in escaping detection, arrest, and punishment by driving Mark Stevens from the scene of the crime.

General Statutes section 15A-924 sets out the requirements for criminal pleadings. Among other things, an indictment must contain:

A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation. When the pleading is a criminal summons, warrant for arrest, or magistrate's order, or statement of charges based thereon, both the statement of the crime and any information showing probable cause which was considered by the judicial official and which has been furnished to the defendant must be used in determining whether the pleading is sufficient to meet the foregoing requirement.

N.C. Gen. Stat. § 15A-924(a)(5) (2009). Our Supreme Court has summarized the rationale behind this rule as follows:

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The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial[;] and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty[,] to pronounce sentence according to the rights of the case.

*State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) (quotations and citation omitted; alterations in original).

We begin our analysis with the essential elements of accessory after the fact to second degree murder. The crime of accessory after the fact is codified in section 14-7 of our General Statutes:

If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute made, . . . such person shall be guilty of a crime, and may be indicted and convicted together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted for such crime whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice. . . . [A]n accessory after the fact to a Class A or Class B1 felony is a Class C felony, an accessory after the fact to a Class B2 felony is a Class D felony[.]

N.C. Gen. Stat. § 14-7 (2009). The elements of accessory after the fact are set out in the common law:

In order to prove a person was an accessory after the fact . . . three essential elements must be shown: (1) a felony was committed; (2) the accused knew that the person he received, relieved or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felon personally.

*State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982) (citations omitted).

Here, the indictment alleges that a felony was committed, that defendant knew that the person he assisted was the person who committed that felony, and that defendant rendered personal assistance to the felon. Without question, the felony identified in the indictment is first degree murder, not second degree murder, but the indictment nevertheless provided defendant with adequate notice to

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prepare his defense and to protect him from double jeopardy. The elements of the underlying felony themselves are not essential elements of the crime of accessory after the fact, which is a distinct, substantive crime. *See State v. McIntosh*, 260 N.C. 749, 753, 133 S.E.2d 652, 655 (1963) (“The crime of accessory after the fact has its beginning after the principal offense has been committed. . . . A comparison of G.S. 14-5, defining accessory before the fact, and G.S. 14-7, accessory after the fact, clearly indicates the necessity of holding the latter is a substantive crime—not a lesser degree of the principal crime.”) (citation omitted). We have held that an indictment for aiding and abetting the sale and delivery of cocaine was sufficient even when it did not name the person being aided and abetted. *State v. Poplin*, 56 N.C. App. 304, 309, 289 S.E.2d 124, 128 (1982). In *Poplin*, we explained that “the indictment asserted facts supporting every element of the criminal offense and the defendant’s commission of it so that the defendant should have clearly been apprised of *the conduct* which was the subject of the accusation.” *Id.* at 308-09, 289 S.E.2d at 128 (emphasis added). Here, defendant was clearly apprised of the conduct which was the subject of the accusation—that he rendered aid to Stevens after Stevens killed Moore. Accordingly, we hold that the variance in the indictment did not deprive the trial court of subject matter jurisdiction.

**B. Motion to Dismiss for Insufficient Evidence: Accessory After the Fact to Second Degree Murder**

[2] Defendant argues that the trial court erred by denying his motion to dismiss the charge of accessory after the fact to second degree murder because the State did not present sufficient evidence to show that defendant knew that Stevens had killed Moore. We disagree.

Our review of the trial court’s denial of a motion to dismiss is well understood. [W]here the sufficiency of the evidence . . . is challenged, we consider the evidence in the light most favorable to the State, with all favorable inferences. We disregard defendant’s evidence except to the extent it favors or clarifies the State’s case. When a defendant moves for dismissal, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion.

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*State v. Hinkle*, 189 N.C. App. 762, 766, 659 S.E.2d 34, 36-37 (2008) (quotations and citation omitted; alteration in original). As set out in the previous section, the elements of accessory after the fact are: “(1) a felony was committed; (2) the accused knew that the person he received, relieved or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felon personally.” *Earnhardt*, 307 N.C. at 68, 296 S.E.2d at 653 (citations omitted).

Defendant argues that he rendered assistance to Stevens “*after* [Moore] had been mortally wounded, but *before* [Moore] died,” and, therefore, defendant did not know that Stevens had committed a felony because the felony was not complete until after defendant drove Stevens away from the scene of the crime. We agree that the evidence is undisputed that Moore ran away from defendant’s vehicle after he was shot and that defendant did not see Moore die. However, if “the totality of the evidence . . . is such to give rise to a *reasonable inference* that defendant knew precisely what had taken place,” then there is sufficient evidence of the knowledge element to survive a motion to dismiss for insufficient evidence. *Id.* Here, defendant knew that Stevens had shot Moore at close range; a jury could reasonably infer that defendant knew that the shot was fatal. Accordingly, we hold that the trial court did not err by denying defendant’s motion to dismiss.

**C. Motion to Dismiss for Insufficient Evidence: Accessory After the Fact to Armed Robbery**

[3] Defendant argues that the trial court erred by denying his motion to dismiss the charge of accessory after the fact to armed robbery because (1) there was insufficient evidence to show that defendant knew that Stevens had committed a robbery and (2) there was insufficient evidence to show that the robbery had been completed when defendant rendered aid to Stevens. We disagree.

The essential elements of armed robbery are:

- (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened. Force or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense.

*State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991) (quotations and citations omitted).

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Defendant argues that there was sufficient evidence to show that an unlawful taking or attempt to take occurred. The State played a DVD of one of Stevens's interrogations, and in that DVD, Stevens said that defendant wanted to go to Liberty Street to get some crack, but he did not want to pay for it. Although Stevens testified at trial that no robbery occurred, such equivocation goes to the weight of the evidence, which is a matter for the jury. In addition, there was no crack or money present on Moore's body, from which a jury could reasonably infer that Stevens kept the crack but did not pay for it.

Defendant argues that the robbery was not complete until he arrived at "a place of safety," his father's house, and thus he did not render any aid to Stevens after the robbery was complete. Defendant cites no North Carolina authority to support this proposition, relying instead on a California case, *People v. Cooper*, 811 P.2d 742 (1991). However, in North Carolina, the taking in a robbery is complete once "the thief succeeds in removing the stolen property from the victim's possession." *State v. Sumpter*, 318 N.C. 102, 111, 347 S.E.2d 396, 401 (1986). Accordingly, defendant's argument is without merit.

**D. Double Jeopardy**

[4] Defendant next argues that his constitutional guarantee against double jeopardy was violated when he was convicted of accessory after the fact to second degree murder and accessory after the fact to armed robbery because the two convictions were based on the same underlying facts. However, defendant did not raise this issue at trial, and he cannot raise it now for the first time on appeal. *See State v. Mason*, 174 N.C. App. 206, 208, 620 S.E.2d 285, 286-87 (2005) ("[D]ouble jeopardy protection may not be raised on appeal unless the defense and the facts underlying it are brought first to the attention of the trial court.") (quotations and citation omitted). Accordingly, we do not review it.

**E. Jury Instructions**

[5] Defendant next argues that the trial court erred by denying his request to instruct the jury on "mere presence" and the meaning of "malice." We hold that the trial court properly denied defendant's requests for these instructions.

"The choice of jury instructions rests within the trial court's discretion and will not be overturned absent a showing of abuse of discretion." *State v. Parker*, 187 N.C. App. 131, 137, 653 S.E.2d 6, 9 (2007) (quotations and citation omitted). "It is well established that

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when a defendant requests an instruction which is supported by the evidence and is a correct statement of the law, the trial court must give the instruction, at least in substance.” *State v. Garner*, 340 N.C. 573, 594, 459 S.E.2d 718, 729 (1995) (citations omitted). Here, however, the instructions were not supported by the evidence, nor were they appropriate under the law, so the trial court properly denied defendant’s requests to give them.

With respect to mere presence, the rule in question is “firmly established law: Mere presence at the scene of a crime does not make one guilty as a principal or as an aider and abettor or as an accessory before the fact.” *State v. Haywood*, 295 N.C. 709, 717-18, 249 S.E.2d 429, 434 (1978) (quotations and citations omitted). Here, defendant was charged with accessory *after* the fact, not with aiding and abetting or accessory before the fact. Thus, his actions during the commission of the underlying crimes were not relevant to the jury’s determination of defendant’s actions *after* Stevens committed the robbery and murder. The trial court properly denied defendant’s request for the instruction.

With respect to malice, defendant argues that the trial court erred by failing to define “malice,” an element of second degree murder. The trial court announced that he would give the pattern jury instructions for accessory after the fact (N.C.P.I.—Crim. 202.40), and neither party objected. The trial court did follow the pattern jury instructions, which instruct trial judges to fill in certain blanks. The portion that defendant argues was improper is set out as follows in the pattern instructions: “First, that (name crime) was committed by another person. (*Set forth elements of the crime*).” The trial court, following the pattern instructions, instructed the jury as follows:

First, that the crime of second degree murder was committed by another person. Second degree murder is the unlawful killing of a human being with malice. And I will define the elements of that crime here and now.

First, that the defendant wounded the victim with a deadly weapon. Second, that the defendant acted intentionally and with malice. And third, that the defendant’s act was a proximate cause of the victim’s death. A proximate cause is a real cause, a cause without which the victim’s death would not have occurred.

Defendant argues that the trial court’s failure to further define “malice” was reversible error.

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Defendant did not object to the instructions, though “when the instruction actually given by the trial court varied from the pattern language,” and the trial court agreed to give the pattern instruction, “defendant was not required to object in order to preserve this question for appellate review.” *State v. Jaynes*, 353 N.C. 534, 556, 549 S.E.2d 179, 196 (2001) (citation omitted). Here, however, it appears that the trial court did follow the pattern instructions. The instructions direct the trial court to “[s]et forth elements of the crime,” and the trial court set forth the elements of the crime. The instructions do not state that a trial court must define every element of the crime or read the pattern jury instruction for the crime, as defendant suggests but provides no authority to support. Accordingly, we hold that this issue was not preserved, and we do not review it further.

**F. Evidentiary Matters**

**[6]** Defendant argues that the trial court erred by admitting improper opinion and character evidence. We disagree.

First, defendant argues that the trial court improperly allowed a detective to give a legal opinion. The testimony in question is as follows:

Q. And what type of case, after your initial evaluation on the scene, what were you looking at?

A. A homicide that resulted from a robbery.

Q. And was your team able to speak to a number of witnesses there at the scene?

A. Yes.

Defendant did not object to the testimony, but he does assert that admitting the statement was plain error. “In criminal cases, a question which was not preserved by objection noted at trial . . . may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C.R. App. P. 10(c)(4) (2008). “Plain error is error ‘so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.’” *State v. Leyva*, 181 N.C. App. 491, 499, 640 S.E.2d 394, 399 (2007) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987)).

However, we find no plain error here. The detective was testifying about police procedure, not giving a legal conclusion as

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defendant asserts. *See State v. O'Hanlan*, 153 N.C. App. 546, 562-63, 570 S.E.2d 751, 761-72 (2002) (“The context in which this testimony was given makes it clear [the investigator] was not offering his opinion that the victim had been assaulted, kidnapped, and raped by defendant, but was explaining why he did not pursue as much scientific testing of physical evidence in this case as he would a murder case because the victim in this case survived and was able to identify her assailant. His testimony was rationally based on his perception and experience as a detective investigating an assault, kidnapping, and rape. His testimony was helpful to the fact-finder in presenting a clear understanding of his investigative process.”).

[7] Next, defendant argues that it was plain error for the trial court to allow various witnesses to reference defendant’s criminal record. Defendant specifically points to (1) disclosures made during the police interrogation DVD, which was admitted into evidence and shown to the jury, and (2) Stevens’s testimony that he had “[b]een knowing [defendant] ever since he came home from prison.” Defendant argues that this evidence was inadmissible under Rule 404(b) of our Rules of Evidence.

Rule 404(b) allows a witness to testify about a defendant’s prior bad acts in limited circumstances:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009).

We agree that the questioned testimony was not admitted for one of the proper purposes specified by Rule 404(b), but the admission of the testimony does not rise to the level of plain error. The evidence was not offered to prove defendant’s character in order to show that he acted in conformity with that character; the context shows that the evidence was not elicited by the prosecution, but, instead, the evidence simply emerged as part of the witnesses’ narrative. Without an objection, neither the trial court nor the jury had any reason to focus on the information, and the likelihood of any resulting prejudice was minimal. Accordingly, we hold that it was not plain error for the trial court to admit this evidence.

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**[8]** Defendant also argues that it was plain error for the trial court not to intervene *ex mero motu* when the prosecutor referred to the above-referenced testimony during her closing statement.

Where, as here, defendant failed to object to any of the closing remarks of which he now complains, he must show that the remarks were so grossly improper that the trial court erred by failing to intervene *ex mero motu*. In order to carry this burden, defendant must show that the prosecutor's comments so infected the trial that they rendered his conviction fundamentally unfair. Moreover, the comments must be viewed in the context in which they were made and in light of the overall factual circumstances to which they referred.

*State v. Call*, 349 N.C. 382, 419-20, 508 S.E.2d 496, 519 (1998) (citations omitted). Viewed in the context in which they were made, and in light of the overall factual circumstances to which they referred, the prosecutor's references to defendant's prior convictions did not so infect the trial that they rendered the conviction fundamentally unfair. Accordingly, we find no plain error.

**III. Conclusion**

We hold that defendant received a trial free from error.

No error.

Judges JACKSON and STEPHENS concur.

Judge JACKSON concurred in this opinion prior to 31 December 2010.



MARKUS PERRY, AND HIS WIFE, VERONICA PERRY, PLAINTIFFS V. THE PRESBYTERIAN HOSPITAL, HAWTHORNE CARDIOVASCULAR SURGEONS, AND DAVID SCOTT ANDREWS, M.D., DEFENDANTS

No. COA10-150

(Filed 4 January 2011)

**Medical Malpractice— causation—compartment syndrome— genuine issue of material fact**

The trial court erred by granting summary judgment in favor of defendants in a medical malpractice case where the evidence

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established a genuine issue of material fact as to the cause of plaintiff's compartment syndrome.

Appeal by plaintiffs from order entered 8 October 2009 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 September 2010.

*Ferguson, Stein, Chambers, Gresham & Sumter, P.A., by James E. Ferguson, II, C. Margaret Errington, and Lareena Jones Phillips, for plaintiffs.*

*Shumaker, Loop & Kendrick, LLP, by Scott M. Stevenson, Stacy Stevenson, and Christian Staples, for defendants.*

ELMORE, Judge.

Markus Perry and his wife, Veronica Perry (together, plaintiffs), appeal an order of summary judgment entered in favor of The Presbyterian Hospital (defendant or defendant hospital). After careful consideration, we reverse the order of summary judgment and remand to the trial court for additional proceedings.

**Background<sup>1</sup>**

Mr. Perry was admitted to the defendant hospital on 14 August 2006 for surgery to repair the mitral valve of his heart. The surgery was performed by David Scott Andrews, M.D., and lasted approximately nine hours, which is an unusually long time for this procedure. Most thoracic operations in hospitals similar to the defendant hospital are performed within three hours, which is considered a "moderate" length of time, and it would be unusual for an operation to last longer than four hours. Dr. Andrews inserted cannulas into Mr. Perry's femoral artery and vein to circulate blood through the heart/lung bypass machine, which maintains oxygenation and circulation while the heart surgery is performed.<sup>2</sup> A femoral cannula blocks the artery going to the lower part of the leg; as a result of the cannulation, blood flow to Mr. Perry's lower leg was reduced. The longer a cannula is in the femoral artery, the longer "it reduces the blood flow to the leg, cuts off the blood flow to the leg, and increases muscle ischemia and

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1. Because we review an order of summary judgment *de novo*, we view the evidence in the light most favorable to the nonmoving party. *In re Will of Jones*, 362 N.C. 569, 577, 669 S.E.2d 572, 578 (2008).

2. When Dr. Andrews removed the femoral arterial cannula, the artery tore in two. Dr. Andrews sewed the artery back together, and he felt "a good pulse distally" after the procedure.

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ischemia to the tissues." A well documented risk of the reduced circulation associated with femoral cannulation is major damage to the muscles of the leg, resulting in amputation or even death. In particular, compartment syndrome is a high risk complication of cannulating a leg for a long period of time. Compartment syndrome is the compression of muscles, nerves, and blood vessels within a closed space, or compartment, of the body. It is caused by extreme pressure within the connective tissue that separates groups of muscles, called the fascia.

After the surgery was complete, Mr. Perry was admitted to the Cardiovascular Critical Care Unit (CVRU) at the defendant hospital and was cared for by Dr. Andrews and the CVRU nurses, who were employees of the defendant hospital. Mr. Perry was in poor condition following the surgery, and he endured a difficult post-operative recovery period. Among other things, he was on a ventilator with high concentrations of oxygen, he had blood clots in his chest, and he gained about forty pounds of fluid as a result of the bypass. His creatinine level was also elevated, which is a sign of kidney failure.

Mr. Perry was sedated and unable to speak for several days following his surgery. However, two days after the surgery, nurse Sylvia White lifted his sedation and Mrs. Perry told Nurse White that she thought her husband was in a lot of pain. The nurse told Mrs. Perry that Mr. Perry wanted to write something, but that he was too weak, and the nurse would not let him write anything. Nevertheless, Mrs. Perry was concerned and wanted to figure out what her husband was trying to communicate. He pointed down to his leg, and Mrs. Perry thought that he had a cramp. She told the nurse that she thought he had a cramp in his leg, and that that was what he was trying to communicate. The nurse replied that she was glad that Mrs. Perry had "figured it out." However, when Mrs. Perry went to massage Mr. Perry's leg to ease his cramp, she noticed that his calf was "harder than . . . a normal leg." At some point during the conversation between Mrs. Perry and Nurse White, Mr. Perry indicated with his eyes that he was experiencing pain in his leg. That same day, Mr. Perry's parents were in the hospital room with Mrs. Perry. Mr. Perry's right foot was uncovered, and his father said, "Mark's foot is cold. And it's purple. Look at it." They called Nurse White over to look at Mr. Perry's foot, telling her that it was cold and "purple or blue." Nurse White replied, "that's normal after heart surgery." The Perrys did not talk to Dr. Andrews about the cold, blue foot because Nurse White had reassured them that it was common.

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That night, at approximately 1 a.m. on 17 August 2006, CVRU nurse Tim McMurray who was caring for Mr. Perry noted that there was no pulse in his right foot. Nurse McMurray contacted Dr. Andrews's physician's assistant, who then contacted Dr. Andrews. Dr. Andrews determined that Mr. Perry had developed compartment syndrome in his right leg, and Dr. Andrews immediately performed a fasciotomy to address the condition. A fasciotomy is a surgical procedure in which long incisions are made to separate the connective tissue that separates groups of muscles to relieve the pressure within the muscle compartment. Despite the corrective procedure, a lot of the muscle and nerve tissue in Mr. Perry's right leg had already died. Mr. Perry underwent extensive debridement of dead tissue, losing approximately thirty percent of the muscle mass in his right leg. He has permanently lost feeling in his right foot, beginning two inches above his ankle. His right leg is permanently disfigured and unsightly, and he has difficulty walking.

Plaintiffs sued defendant, Hawthorne Cardiovascular Surgeons, P.A., and Dr. Andrews. In their amended complaint, plaintiffs alleged that defendant was negligent in its care and treatment of Mr. Perry because it "fail[ed] to ensure that its employees, servants, and agents would properly monitor and manage Mr. Perry's postoperative recovery" and defendant's "employees, servants, and agents [failed] to appropriately detect and report Mr. Perry's signs and symptoms of compartmental syndrome and to act upon it before it became an irreversible problem." The amended complaint alleged that the nurses who provided care to Mr. Perry were "employees, agents, or servants of defendant Hospital" and that Dr. Andrews was "an agent or servant of defendant Hospital." The amended complaint also included claims for loss of consortium and emotional distress.

After plaintiffs deposed their expert witnesses, defendant moved for summary judgment. The trial court granted defendant's motion and also granted a stay of proceedings in plaintiffs' case against Hawthorne Cardiovascular Surgeons and Dr. Andrews until plaintiffs' appeal to this Court is complete. Plaintiffs now appeal.

Plaintiffs argue that the trial court erred by granting summary judgment to defendant because the evidence establishes a genuine issue of material fact as to causation. We agree.

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

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issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). This Court reviews an order allowing summary judgment *de novo*.

In deciding a motion for summary judgment, a trial court must consider the evidence in the light most favorable to the non-moving party. If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. The moving party bears the burden of showing that no triable issue of fact exists. This burden can be met by proving: (1) that an essential element of the non-moving party's claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that the non-moving party cannot surmount an affirmative defense which would bar the claim. Once the moving party has met its burden, the non-moving party must forecast evidence that demonstrates the existence of a *prima facie case*.

*Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 370, 663 S.E.2d 450, 452 (2008) (additional citations omitted). The essential elements of a medical negligence claim are: "(1) the standard of care, (2) breach of the standard of care, (3) proximate causation, and (4) damages." *Turner v. Duke University*, 325 N.C. 152, 162, 381 S.E.2d 706, 712 (1989) (citation omitted). Here, the only element in question is causation.

Two of plaintiffs' expert witnesses, Nevin M. Katz, M.D., and Robert M. Bojar, M.D., testified during their depositions that Dr. Andrews breached the standard of care by not creating a heightened awareness for compartment syndrome in his notes or by orders to the nursing staff. Dr. Katz also testified that it was a breach of the standard of care for Dr. Andrews not to lighten Mr. Perry's anesthesia in order to ask Mr. Perry whether he could move his foot, whether he was experiencing pain and, if so, where that pain was. According to Dr. Katz, pain in the leg is a "really important sign[] of leg ischemia and leg impending necrosis[.]" Had Dr. Andrews asked the nurses to lighten the anesthesia and to ask Mr. Perry, "Does your leg hurt," and had Mr. Perry pointed to his leg, then the caregiving team "would have known that muscle was dying and that the compartment syndrome was having an effect. In addition, one could ask him to move his foot, and if he couldn't move his foot, then that would have been an additional indication." Dr. Katz testified that, had Dr. Andrews been appropriately concerned about compartment

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syndrome, he would have been measuring the creatinine phosphokinase muscle fraction (CPKMM) levels, which rise when muscle dies and are an indicator of muscle death and compartment syndrome. CPKMM levels were very high when they were measured on 17 and 18 August 2006, after the compartment syndrome was discovered, but Dr. Katz explained that if the care team had begun measuring CPKMM levels “early postoperatively, they would have seen the rise in the CPK[MM], and one would have said there is irreversible damage.” Dr. Katz testified that it was a breach of the standard of care for Dr. Andrews to fail to order CPKMM measurements. He also testified that Mr. Perry developed kidney failure as a result of the compartment syndrome, and creatinine levels, which *were* measured postoperatively, suggested kidney failure stemming from muscle death.

Dr. Katz testified that a heightened awareness of Mr. Perry’s risk for compartment syndrome “could” have allowed an early fasciotomy. He explained, “Whether it would have prevented most of the damage, I don’t know, but I suspect it would have made an important difference.” In particular, an earlier fasciotomy would have made an “[i]mportant difference in terms of the amount of muscle that had to be debrided,” though he qualified that statement by saying,

I am not able to and I don’t know that anybody would know, along the time scale from the time of the operation to the time of fasciotomy, when all the irreversible damage occurred. And all I know is that there were signs it was going on early after surgery, and if we had more laboratory information, we would have been able to pinpoint it better.

Similarly, Dr. Bojar testified that Mr. Perry’s compartment syndrome was discovered once his pedal pulse disappeared, which is “an extremely late phase of compartment syndrome[.]” When asked to pinpoint the exact moment that “the cell death in Mr. Perry’s leg reach[ed] the point of no return in that nothing was going to make th[e] outcome different,” Dr. Bojar explained:

We know that compartment syndromes once they’re established, cell death occurs, it’s written six to ten hours after that.

So I believe that the initial cell death was occurring most of the 16th [of August] and perhaps starting on the evening of the 15th [of August] because once there is a slight decrease in pulse, that’s a very ominous sign because that shouldn’t have happened because that’s the last thing you see.

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So I believe that the progression of ischemia from the reprofusion time and all the different phenomena post-op which is causing more capillary leak and more fluids caused more compartment syndrome and it [was] evident even on the 15th.

So I believe some irreversible injury was occurring as early muscle necrosis on the evening of the 15th into the 16th.

The following colloquy then ensued between counsel and Dr. Bojar:

Q. So if there is muscle necrosis on the evening of the 15th, if a fasciotomy had been performed on the evening of the 15th, let's just pick a time, at 7 p.m., change of shift, would Mr. Perry's outcome have been any different than it is today.

A. Yes. The reason I say that is it's a progressive phenomenon, that is, the earlier you intervene, you have less damage.

Q. And are you able to quantify that?

A. I cannot.

Q. So what I hear you saying, and I don't mean to belabor the point, but what I hear you saying is in terms of the compartment syndrome, which we know is absolutely irreversible —

A. Well, it's irreversible if it's treated too late.

Q. Right.—your opinion is it could have been as early as the end of the surgery on the 14th?

A. In theory it's possible because of the fact that he complained of pain on the morning of the 15th per Mrs. Perry, that's a sign of ischemia of your nerves and your muscles at that time.

Now, that does not mean that is irreversible damage at that time, but it's a manifestation [o]f inferior perfusion so we don't know the exact progression of how impaired the perfusion became and what the repeatedly */sic/* was.

So if one had intervened on the 14th or 15th or even early on the 16th, the amount of damage would have been less, but there would have been damage.

Q. And you're not able to quantify how much damage there would have been?

A. At any point it's impossible to say, it's simply progressive.

\* \* \*

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Q. If . . . Dr. Andrews had intervened and performed a fasciotomy on the morning of the 15th, can you say to a reasonable degree of medical certainty that Mr. Perry's outcome would be different than it is today?

A. Yes.

Q. And can you quantify how different the outcome would be?

A. Better.

Q. So the answer is no, you can't quanti[f]y it?

A. Well, I can quantify it in quantum leaps. You can't give an exact percentage because no one knows and anybody that gives you an answer with a number is making it up.

The point is if he is having ischemia on the morning of the 15th with pain, he may be having minimal damage that's irreversible so he may have a fasciotomy and have no damage whatsoever.

When I say damage, I mean clinical damage as opposed to microscopic damage.

Later on the 15th, again, we don't know even though I believe he had some increase in his compartment pressures leading to a compartment syndrome, we can't say it's irreversible at that time either, but it could have been.

But on the 16th I think it would have been irreversible and progressive over the course of the 16th and the 17th. So I know I am sort of answering your question because I am answering the best I can.

Plaintiffs presented sufficient evidence to raise a genuine issue of material fact with respect to Dr. Andrews's negligence, but whether Dr. Andrews's alleged negligence can be attributed to *defendant* is a different matter.

As this Court has held, under the doctrine of respondeat superior, a hospital is liable for the negligence of a physician or surgeon acting as its agent. There will generally be no vicarious liability on an employer for the negligent acts of an independent contractor. This Court has established that the vital test in determining whether an agency relationship exists is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details.

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Specifically, the principal must have the right to control both the means and the details of the process by which the agent is to accomplish his task in order for an agency relationship to exist.

*Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 299, 628 S.E.2d 851, 857 (2006) (quotations and citations omitted). Here, plaintiffs have not provided sufficient evidence that Dr. Andrews was defendant's agent. In an interrogatory answer, defendant said that Dr. Andrews was not an employee of defendant. When asked to produce "a copy of all contracts in effect from August of 2006 through October of 2006 between [defendant] Presbyterian Hospital and any of the other named defendants in this action," defendant objected to the request and then responded, "Subject to and without waiving this objection, this Defendant is not aware of any documents responsive to this request." It is not apparent from the record before us that defendant retained control over Dr. Andrews such that an agency relationship existed between them. Accordingly, plaintiffs' evidence of Dr. Andrews's alleged negligence cannot be imputed to defendant.

However, plaintiffs also deposed two nursing experts, Frances R. Eason, R.N., Ed.D., and Rosemarie Ameen, BSN, CCRN, CINC. Eason testified that the nursing staff deviated from the standard of care, but she testified that she could not say that these breaches were the proximate cause of Mr. Perry's injuries. Ameen also testified that the nursing staff deviated from the standard of care for various reasons, and that defendant deviated from the standard of care by failing to teach its nurses to recognize the signs and symptoms of compartment syndrome.

Ameen then testified that the nurses' failure to inform Dr. Andrews when Mr. Perry's pulse changed caused Mr. Perry's adverse outcome. Dr. Andrews ordered the nurses to check the pulses in Mr. Perry's feet every four hours. The nurses assessed the strength of those pulses using a scale of one to three, with three being a "strong and palpable" pulse and one being "intermittently palpable." The strength of the pulse in Mr. Perry's right foot dropped from a three at 6 p.m. on 15 August 2006 to a two at 7 p.m. on 15 August 2006. It dropped again from a two at 9 p.m. on 15 August 2006 to a one at 7 a.m. on 16 August 2006. Although Dr. Andrews ordered the nurses to check Mr. Perry's pulses every four hours, there was no record that Nurse McMurray checked the pulse in Mr. Perry's right foot between 9 p.m. on 15 August 2006 and 7 a.m. on 16 August 2006. According to Ameen, "had a doctor been notified of the change in pulse from three

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to one at three a.m. on August 15th[,] . . . the outcome for Mr. Perry more likely than not would have been different." However, Ameen later provided conflicting testimony:

Q. But you can't sit here and tell me that more likely than not had Dr. Andrews been notified or someone on his—in his practice been notified at three a.m. on August the 15th that that would have more likely than not altered the outcome for Mr. Perry, can you?

[COUNSEL]: Object to the form. It's already been answered. She's already answered the question.

A. No, I can't tell you that for sure.

Q. Okay. And at any other point that you've opined that the nurses should have notified the doctor with regard to Mr. Perry's condition are you able to tell me that had the doctor been notified at any of those other instances where you believe he should have that more likely than not the outcome would have been different for Mr. Perry?

A. I can't—I can't say yea or nay.

Q. Okay.

A. It's—because I can't—you know, I can't say what the doctor would have done or not done.

Ameen's testimony was inconsistent on this point, but resolving that inconsistency is not appropriate when deciding a motion for summary judgment. *See Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004) ("Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist."); *see also City of Thomasville v. Lease-Aflex, Inc.*, 300 N.C. 651, 655, 268 S.E.2d 190, 193-94 (1980) ("[I]f there is any question as to the credibility of affiants in a summary judgment motion or if there is a question which can be resolved only by the weight of the evidence, summary judgment should be denied.").

Based on the record before us, plaintiffs have raised genuine issues of material fact with respect to their negligence claim against defendant. Plaintiffs' nursing experts opined that the nurses, defendant's employees, deviated from the standard of care. Although Eason testified that she could not state that these breaches caused Mr. Perry's injuries, Ameen *did* testify that the nurses' breaches caused

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Mr. Perry's "adverse outcome." She also testified that, in her opinion, if the nurses had notified Dr. Andrews of the drop in pulse quality on 15 August 2006, it is "more likely than not" that Mr. Perry's outcome would have been different. Dr. Bojar and Dr. Katz both testified that Dr. Andrews's earlier intervention would have changed Mr. Perry's outcome. Dr. Katz testified that Dr. Andrews could have safely performed the fasciotomy earlier. Although none of the experts could say exactly what percentage of Mr. Perry's injuries could have been averted if Dr. Andrews had performed the fasciotomy one or two days earlier, all of the experts agreed that compartment syndrome is progressive and that earlier intervention would have prevented at least some of the damage to Mr. Perry's leg.

Accordingly, we hold that summary judgment was inappropriate, and we reverse the order of the trial court and remand for further proceedings.

Reverse and remand.

Judges JACKSON and STEPHENS concur.

Judge JACKSON concurred prior to 31 December 2010.

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STATE OF NORTH CAROLINA v. THOMAS JOHN STARR, DEFENDANT

No. COA10-752

(Filed 4 January 2011)

**1. Assault—on firefighter with firearm—evidence sufficient**

The trial court properly denied defendant's motion to dismiss three charges of assaulting a firefighter with a firearm where defendant argued that there was insufficient evidence that the firefighters knew of or otherwise were in fear of defendant's blind shots into a door which they were forcing. Sustaining a conviction for assault did not require that a victim be placed in fear, only that an overt act was performed that was sufficient to put a person of reasonable firmness in fear of immediate bodily harm. Here, the evidence tended to show that defendant shot twice at a door which firefighters were attempting to force open and once in the direction of the firefighters after they entered.

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**2. Assault—on firefighter with firearm—instructions—oral request for special instruction—denied**

The trial court did not err by giving only the pattern jury instruction on assault where defendant did not submit his request for a special instruction on the definition of assault in writing.

**3. Appeal and Error—preservation of issues—response to jury question—no request that jury be returned to courtroom**

Defendant waived his right to appeal the issue of whether the trial judge erred by answering a jury question from the jury room doorway where defense counsel did not request that the jury be brought into the courtroom when the court asked counsel about its proposed procedure.

**4. Jury—question—discretion exercised in response**

The trial court properly exercised its discretion in denying the jury's request to review particular testimony by stating that the court lacked the capability to provide "realtime" transcripts and that they would have to rely on their recollections.

Appeal by defendant from judgments entered 12 November 2008 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 1 December 2010.

*Attorney General Roy Cooper, by Assistant Attorney General Karen A. Blum, for the State.*

*Greene & Wilson, P.A., by Thomas Reston Wilson, for defendant-appellant.*

HUNTER, Robert C., Judge.

Defendant Thomas John Starr appeals his convictions of four counts of assaulting a firefighter with a firearm, contending primarily that there is insufficient evidence that he assaulted the firefighters and thus the trial court should have granted his motion to dismiss the charges. We conclude, however, that the State presented sufficient evidence to permit the jury to reasonably conclude that defendant assaulted the firefighters. The trial court, therefore, properly submitted the charges to the jury.

**Facts**

The State presented evidence at trial tending to establish the following facts: In September 2007, Lakeisha Cropper was living with

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her boyfriend in a second-floor apartment in Seahawk Square Apartments in Wilmington, North Carolina. Defendant lived in the apartment directly above Ms. Cropper's. Around 4:30 p.m. on 20 September 2007, Ms. Cropper and her boyfriend were sitting on the steps outside their apartment when she went inside to use the bathroom and saw water running from the ceiling, out of the vents, and down the walls. Ms. Cropper and her boyfriend could hear defendant walking around upstairs, so they went upstairs to his apartment and began knocking on his door. After knocking for 10 to 15 minutes without defendant answering the door, they became concerned that "something might be wrong" and called 911, reporting that "there [was] a man upstairs and th[at] water [was] leaking in [their] apartment."

Fire Captain Eric Lacewell, along with Firefighters Christopher Chadwick, Andrew Comer, and Marvin Spruill, with the Wilmington Fire Department, responded to the call. They initially went to Ms. Cropper's apartment and saw the water running down through the light fixtures and down the walls. The firefighters, concerned that the water running through the fixtures was an electrical hazard and that defendant might need medical assistance since he had not responded to Ms. Cropper's knocking on his door, went up to his apartment and started "banging on the door" and announcing that they were with the fire department. Defendant did not answer the door. Sometime while the firefighters where knocking, the water stopped running.

Corporal John Musacchio, with the Wilmington Police Department, arrived at the apartment complex, went up to defendant's apartment, knocked on the door, and announced that he was with the police department. When there was no response, the fire battalion chief and Corporal Musacchio gave the firefighters "permission to make forced entry." Firefighters Spruill and Chadwick were directly in front of the door to defendant's apartment, with Spruill on the left and Chadwick on the right. Firefighter Comer was behind Firefighter Spruill; Captain Lacewell was behind Firefighter Comer, on his left, and Corporal Musacchio was behind Comer, on his right. Firefighter Spruill wedged the Halligan tool between the door and the jamb and Firefighter Chadwick began hitting the tool with an axe to break the lock. As the door started splitting, Firefighters Spruill and Chadwick heard a "pop." They looked at each other, and, unable to determine what the noise was, continued to use the axe and Halligan tool. Captain Lacewell, who had also heard the "pop," yelled "[t]hat's a gun," but Firefighters Spruill and Chadwick were unable to hear him over the noise of the Halligan tool. Firefighters Spruill and

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Chadwick broke the lock with the next swing, and, as Spruill was forcing open the door, he heard a second “pop.” Firefighter Spruill started to enter the apartment but saw defendant standing in the apartment’s kitchen, about 12 feet away, pointing a pistol at him. As defendant fired at Firefighter Spruill, he “ducked and backed out” of the apartment and shouted: “ ‘He’s got a gun[.]’ ”

Firefighter Chadwick, who was able to see defendant inside the apartment pointing his gun in the direction of the door, immediately ducked out of the doorway and heard “another pop.” Captain Lacewell also ducked out of the doorway when he heard Firefighter Spruill yell that defendant had a gun. Corporal Musacchio drew his gun, entered the apartment, and ordered defendant to drop the pistol. Defendant complied and Corporal Musacchio arrested defendant and secured a .25 semi-automatic handgun.

The police obtained a search warrant for defendant’s apartment and found three spent shells and two unspent shells on the floor near where defendant had been standing. They also found a rifle in one of the bedrooms as well as marijuana, rolling papers, and a rolling machine in the kitchen. The crime scene investigators located two bullet holes in the wall next to the front door, one in the door jamb and the other just to the right of it. They also found that the apartment’s bathroom sink had been plugged with a rag and filled with water.

Defendant was charged with one count of assaulting a law enforcement officer with a firearm and four counts of assaulting a firefighter with a firearm, one count each with respect to Firefighters Chadwick (07 CRS 61928), Comer (07 CRS 61932), and Spruill (07 CRS 61930), as well as Captain Lacewell (07 CRS 61931). Defendant pled not guilty and the case proceeded to trial. At the close of the State’s evidence and at the close of all the evidence, defendant moved to dismiss all the charges for insufficient evidence. The trial court denied both motions. On 5 August 2008, the jury acquitted defendant of the charge of assaulting a law enforcement officer with a firearm but convicted him on all four counts of assaulting a firefighter with a firearm. After reviewing a pre-sentencing commitment study by the Department of Correction, the trial court entered two judgments on 12 November 2008, each consolidating two of the four convictions, sentencing defendant to two consecutive presumptive-range terms of 19 to 23 months imprisonment. The trial court then suspended the sentences and imposed 36 months of supervised probation. Although defendant filed a notice of appeal on 18 November 2008, defendant’s

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appeal was never perfected. Defendant filed a petition for writ of certiorari with this Court on 26 August 2010, requesting review of his convictions. We now grant defendant's petition.<sup>1</sup>

## I

[1] Defendant argues that the trial court erred in denying his motion to dismiss for insufficient evidence three of the four charges for assault on a firefighter with a firearm. A defendant's motion to dismiss should be denied if there is substantial evidence: (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of the offense. *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "Substantial evidence" is that amount of relevant evidence that a "reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In determining the sufficiency of the evidence, "the trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State." *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). The sufficiency of the evidence is a question of law, reviewed de novo on appeal. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007).

Defendant was charged with four counts of assaulting a firefighter with a firearm in violation of N.C. Gen. Stat. § 14-34.6 (2009), which provides in pertinent part:

- (a) A person is guilty of a Class A1 misdemeanor if the person commits an assault or an affray on any of the following persons who are discharging or attempting to discharge their official duties:
  - (1) An emergency medical technician.
  - (2) A medical responder.
  - (3) An emergency department nurse.
  - (4) An emergency department physician.
  - (5) A firefighter.

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1. We note that the State does not oppose granting defendant's petition for writ of certiorari.

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(c) Unless a person's conduct is covered under some other provision of law providing greater punishment, a person is guilty of a Class F felony if the person violates subsection (a) of this section and uses a firearm.

N.C. Gen. Stat. § 14-34.6(a), (c). Based on the statute, the elements of assaulting a firefighter with a firearm are: (1) an assault; (2) with a firearm; (3) on a firefighter; (4) while the firefighter is engaged in the performance of his or her duties. N.C. Gen. Stat. § 14-34.6(a), (c). Defendant challenges the sufficiency of the evidence with respect to only the first element—whether an assault occurred. Defendant further limits the scope of this appeal by arguing for the reversal of his convictions with respect to only three of the four firefighters: Andy Comer (07 CRS 61932), Eric Lacewell (07 CRS 61931), and Chris Chadwick (07 CRS 61928). We, therefore, do not address the sufficiency of the evidence to support defendant's conviction with respect to Marvin Spruill (07 CRS 61930).

An “assault” is “an overt act or attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or violence must be sufficient to put a person of reasonable firmness in fear of immediate physical injury.” *State v. Haynesworth*, 146 N.C. App. 523, 529, 553 S.E.2d 103, 108 (2001) (citing *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967)). Defendant contends that there is insufficient evidence as to “whether the firemen making forced entry on [defendant]’s house in fact knew of and otherwise drew fear and apprehension from [defendant]’s blind shots into the door.”

Contrary to defendant’s argument, this Court has held that it is “not necessary that the victim be placed in fear in order to sustain a conviction for assault.” *State v. Musselwhite*, 59 N.C. App. 477, 481, 297 S.E.2d 181, 184 (1982). Rather, “[a]ll that is necessary to sustain a conviction for assault is evidence of an overt act showing an intentional offer by force and violence to do injury to another sufficient to put a person of reasonable firmness in apprehension of immediate bodily harm.” *Id.* (emphasis added). Our Supreme Court has held that “[i]t is an assault, without regard to the aggressor’s intention, to fire a gun at another or in the direction in which he is standing.” *State v. Newton*, 251 N.C. 151, 155, 110 S.E.2d 810, 813 (1959) (quoting 1 *Wharton’s Criminal Law and Procedure* § 332).

Here, the State’s evidence tends to show that defendant shot twice at the door while the firefighters were attempting to force open

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the door and that defendant fired a third shot in the direction of the firefighters after they forced entry. In fact, defendant testified at trial that he was aware that people were outside “pounding” on the door, that he could hear them shouting, although he could not tell what they were saying, and that he shot at the door “to send a warning to whatever was on the other side . . . .” This evidence, considered in the light most favorable to the State, supports a reasonable inference that defendant’s intentionally shooting at the door while the firefighters were behind it and shooting at the firefighters while they were in the doorway was “sufficient to put a person of reasonable firmness in apprehension of immediate bodily harm.” *Musselwhite*, 59 N.C. App. at 481, 297 S.E.2d at 184; *see also Commonwealth v. Melton*, 436 Mass. 291, 295 n.4, 763 N.E.2d 1092, 1096 n.4 (2002) (noting that, in establishing assault by immediately threatened battery, “[a] single shot in the direction of a group of people is intentionally menacing conduct that can cause each person reasonably to fear an imminent battery”); *Robbins v. State*, 145 S.W.3d 306, 314 (Tex. Crim. App. 2004, pet. ref’d) (holding evidence was sufficient to support conviction for “aggravated assault by threatening [police] officers with bodily injury while using or exhibiting a firearm” where evidence showed that officers were “stationed” near armored vehicle during standoff with defendant and were “in the line of fire when [defendant] pointed and shot his gun in the direction of the [armored vehicle]”). The trial court, therefore, properly denied defendant’s motion to dismiss the three charges of assaulting a firefighter with a firearm with respect to Andy Comer (07 CRS 61932), Eric Lacewell (07 CRS 61931), and Chris Chadwick (07 CRS 61928).

## II

[2] Defendant also contends that “[t]he trial court erred in denying defendant’s request that the jury be instructed on the underlying elements of assault.” Defendant maintains that the trial court’s failure to properly instruct the jury constitutes prejudicial error, entitling him to a new trial.

During the charge conference, after the trial court read the pattern jury instructions with respect to the charge of assaulting a firefighter with a firearm, defense counsel made an oral request to include “a definition for the word ‘assault.’ ” The trial court denied the orally requested instruction and instructed the jury on the elements of the offense according to the pattern jury instruction: N.C.P.I.-Crim. 208.95A.

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N.C. Gen. Stat. § 15A-1231(a) (2009) “provides for conferences on jury instructions and states that ‘any party may tender written instructions.’” *State v. McNeill*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997) (quoting N.C. Gen. Stat. § 15A-1231(a)), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998). “[W]here ‘a specifically requested jury instruction is proper and supported by the evidence, the trial court must give the instruction, at least in substance.’” *State v. Jones*, 337 N.C. 198, 206, 446 S.E.2d 32, 36 (1994) (quoting *State v. Ford*, 314 N.C. 498, 506, 334 S.E.2d 765, 770 (1985)). Requested special instructions, however, “‘should be submitted in writing to the trial judge at or before the jury instruction conference.’” *State v. Augustine*, 359 N.C. 709, 729, 616 S.E.2d 515, 530 (2005) (quoting Rule 21 of the General Rules of Practice for the Superior and District Courts), *cert. denied*, 548 U.S. 925, 165 L. Ed. 2d 988 (2006). Thus, where, as here, “the defendant fails to submit his request for instructions in writing,” the “trial court’s ruling denying [the] requested instructions is not error . . . .” *McNeill*, 346 N.C. at 240, 485 S.E.2d at 288; *see also State v. Martin*, 322 N.C. 229, 237, 367 S.E.2d 618, 623 (1988) (“The defendant in this case did not submit his request for instructions in writing. We hold it was not error for the court not to charge on this feature of the case.”); *State v. Craig*, 167 N.C. App. 793, 794, 606 S.E.2d 387, 387 (2005) (“Defendant contends the trial court erred by denying his request to give a special instruction on the defense of justification of possession of a firearm by a felon. Where, as here, Defendant failed to submit the special instruction in writing, the trial court did not error by declining to give it.”). Defendant’s argument is overruled.

**III**

[3] In his final contention on appeal, defendant argues that the trial court failed to follow the procedures set out in N.C. Gen. Stat. § 15A-1233 (2009) in responding to the jury’s request to review the testimony of Firefighter Spruill during deliberations. The statute provides in pertinent part:

If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence.

N.C. Gen. Stat. § 15A-1233(a). Our Supreme Court has explained that N.C. Gen. Stat. § 15A-1233(a) “imposes two duties upon the trial court

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when it receives a request from the jury to review evidence": (1) "the court must conduct all jurors to the courtroom"; and (2) "the trial court must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury together with other evidence relating to the same factual issue." *State v. Ashe*, 314 N.C. 28, 34, 331 S.E.2d 652, 656 (1985).

Here, after the jury retired to deliberate, the following occurred:

THE COURT: They've got a question. Let the record reflect that they've sent another note saying, "We are requesting the testimony of Marvin Spruill.

Of course we don't have that. We don't have that capability and I thought that if it was okay with you, since we're in the middle of jury selection in this one, that we would open the door without y'all being seen and let [the court reporter] take everything down and me just inform them to rely on their recollections. We don't have the modern day equipment to provide realtime transcript or something.

(NO VERBAL RESPONSE.)

(THE FOLLOWING TOOK PLACE AT THE JURY ROOM DOOR.)

THE COURT: Hey, freeze what you're doing right now. I have received this note, "We are requesting the testimony of Marvin Spruill." In North Carolina we don't have the capability of realtime transcripts so we cannot provide you with that. You are to rely on your recollection of the evidence that you have heard in your deliberations. That's my instruction to you. Okay. Thank you.

Although defendant did not object at trial to the trial court's failure to bring the jury back into the courtroom, "[a] lack of objection at trial does not bar a defendant's right to assign error to a judge's failure to comply with the mandates of Section 15A-1233(a)." *State v. Helms*, 93 N.C. App. 394, 401, 378 S.E.2d 237, 241 (1989). The transcript indicates, however, that the trial judge specifically asked the prosecutor and defense counsel, "if it was okay with you," he would instruct the jury from the jury room's doorway. Defense counsel did not request that the jury be brought back into the courtroom and he acceded to the procedure used by the trial court. Where, as here, "a defendant's lawyer consents to the trial court's communication with the

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jury in a manner other than bringing the jury back into the courtroom, the defendant waives his right to assert a ground for appeal based on failure to bring the jury back into the courtroom.” *State v. Pointer*, 181 N.C. App. 93, 99, 638 S.E.2d 909, 913 (2007); *accord Helms*, 93 N.C. App. at 401, 378 S.E.2d at 241 (“In the transcript, Judge Saunders notes that he specifically asked defendant’s lawyer if the latter required the jury to be returned to the courtroom. The lawyer did not ask that the jury be brought in, and he acceded to the procedure Judge Saunders used. . . . In this case, however, defendant’s lawyer, beyond simply failing to enter an objection, consented to the communication procedure. We hold, therefore, that defendant has waived his right to assert, on appeal, the judge’s failure to bring the jury to the courtroom.”).

**[4]** Defendant also contends that the trial judge erred in denying the jury’s request to review Firefighter Spruill’s testimony. Defendant maintains that the judge’s statement to the jury regarding the lack of the capability to provide “realtime transcripts” demonstrates that the judge “failed to properly exercise [his] discretion” under N.C. Gen. Stat. § 15A-1233(a).

“It is within the court’s discretion to determine whether, under the facts of a particular case, the transcript should be available for reexamination and rehearing by the jury.” *State v. Barrow*, 350 N.C. 640, 646, 517 S.E.2d 374, 378 (1999). The trial court’s “complete failure” to exercise its discretion under N.C. Gen. Stat. § 15A-1233(a) constitutes reversible error. *State v. McVay*, 174 N.C. App. 335, 340, 620 S.E.2d 883, 886 (2005). Our Supreme Court has held, however, that the trial court properly exercises its discretion in denying the jury’s request to review testimony when the court instructs the jurors to rely on their recollection of the evidence in reaching a verdict. *See State v. Harden*, 344 N.C. 542, 563, 476 S.E.2d 658, 669 (1996) (concluding that trial court exercised its discretion under N.C. Gen. Stat. § 15A-1233 where the court “instruct[ed] . . . the jurors [to] rely upon their individual and collective memory of the testimony”), *cert. denied*, 520 U.S. 1147, 137 L. Ed. 2d 483 (1997); *State v. Corbett*, 339 N.C. 313, 338, 451 S.E.2d 252, 265 (1994) (“In instructing the jury to rely upon their individual recollections to arrive at a verdict, the trial court exercised its discretion and complied with the requirements of N.C.G.S. § 15A-1233(a.”).

While the trial judge did not explicitly state that he was denying, in his discretion, the jury’s request, the judge did instruct the jurors to “rely on [their] recollection of the evidence that you have heard in

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your deliberations.” The trial court, therefore, properly exercised its discretion in denying the jury’s request to review Firefighter Spruill’s trial testimony. *See State v. Lawrence*, 352 N.C. 1, 27, 530 S.E.2d 807, 824 (2000) (holding trial court properly exercised its discretion and “did not impermissibly deny the [jury’s] request [to review witness testimony] based solely on the unavailability of the transcript” where court instructed the jurors, “members of the jury, it is your duty to recall the evidence as the evidence was presented”), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001).

No error.

Judges CALABRIA and ELMORE concur.



STATE OF NORTH CAROLINA v. LARRY MACKEY

No. COA09-1382

(Filed 4 January 2011)

**1. Sentencing—aggravating factors—insufficient notice**

The trial court erred in sentencing defendant in the aggravated range for three charges of discharging a weapon into an occupied property where the State failed to provide defendant proper written notice of its intent to prove aggravating factors for sentencing. The State’s letter to defendant regarding plea negotiations did not provide sufficient notice under N.C.G.S. § 15A-1340.16.

**2. Search and Seizure—standing—passenger in vehicle—no possessory interest**

The trial court did not err in concluding that defendant lacked standing to challenge the search of a vehicle in which he was a passenger and in denying his motion to suppress evidence obtained from the search. Defendant did not own the vehicle and he asserted no possessory interest in the vehicle or its contents.

Appeal by defendant from judgments entered 14 May 2009 by Judge Clifton E. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 March 2010.

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*Attorney General Roy Cooper, by Special Deputy Attorney General Marc Bernstein, for the State.*

*Geoffrey W. Hosford for defendant appellant.*

HUNTER, JR., Robert N., Judge.

Larry Mackey (“defendant”) appeals his convictions for three counts of discharging a weapon into occupied property and one count of assault with a deadly weapon. On appeal, defendant contends that the trial court erred by permitting a plea agreement to constitute proper notice of the State’s intention to seek an aggravated sentence range and by denying his motion to suppress evidence based on his contention that the arresting officer exceeded the scope of a lawful search incident to arrest. After review, we hold that defendant received a trial free of prejudicial error.

### I. Factual Background

Arlysa Ferguson dated defendant for over two years. On 20 August 2007, defendant called Ms. Ferguson on her home phone several times during the day but could not reach her. Defendant wanted to retrieve a cell phone and some of his personal belongings from Ms. Ferguson’s home. Defendant finally spoke with Ms. Ferguson after she returned home later that day. Defendant arrived at Ms. Ferguson’s house, but Ms. Ferguson refused to come outside to see him. However, they continued to speak by phone. Ms. Ferguson and defendant argued about a cell phone that he had purchased for her. Defendant wanted the phone returned, but Ms. Ferguson refused to go outside. Instead, she asked her brother Paxton to go outside and return the phone to defendant.

When Paxton returned, defendant again asked Ms. Ferguson to come outside and talk to him. When she again refused, defendant began shooting a gun into the sunroom where Ms. Ferguson was located. Ms. Ferguson testified that defendant “pulled the gun out and started shooting . . . [and that she] tried to run and get away.” Ms. Ferguson heard three or four shots fired into the sunroom located at the back of the house. Subsequently, she heard two shots fired toward the front of the home. Ms. Ferguson did not directly observe defendant fire those shots, but she testified she heard him yelling while he was running away.

At the time the shots were fired, there were four people inside the home. Defendant was the only person outside the home. Ms.

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Ferguson testified that after the gunfire ceased, she was crying and stated that defendant shot her. Someone called the police, and Officer T.J. Farmer responded to the call regarding the shooting at Ms. Ferguson's home.

Upon entering the residence, Officer Farmer found Ms. Ferguson hysterical and holding a bloody towel on her left leg. There were drops of blood and shattered glass on the floor and holes in the walls. Ms. Ferguson reported to Officer Farmer that her ex-boyfriend, defendant, had been calling her all day and had finally come over to her residence. She further indicated that the shots were fired while defendant was outside the home. Ferguson was treated at the hospital where x-rays indicated that she had a bullet lodged in her leg. At the time of trial, Ferguson had a scar from the wound. The shooting also left several bullet holes in the house. Three bullet casings were recovered from inside the sunroom by investigators.

On 31 August 2007, approximately eleven days after the shooting, Officer George Nickerson, Jr., of the Charlotte-Mecklenburg Police Department executed a traffic stop after observing a vehicle run a red light. There were two individuals in the vehicle, the driver and defendant. Defendant was sitting in the front passenger seat. Following the stop, the driver and defendant each gave Officer Nickerson a fictitious name. In addition, the driver did not possess a driver's license. At this time, Officer Nickerson noticed a strong odor of unburned marijuana emanating from the vehicle, and subsequently told defendant and the driver to exit the vehicle so that he could execute a search of the vehicle. At this point, defendant was patted down to make sure he had no weapons on his person. Defendant was not arrested but was informed by Nickerson that he could not leave. While the vehicle was searched, defendant was not handcuffed and was less than "six feet from the vehicle." During the search, Officer Nickerson found a loaded Smith and Wesson Model No. 915 firearm under the rear seat. Defendant was arrested at the conclusion of the search.

Firearms expert William McBrayer analyzed the three casings found at Ms. Ferguson's home and the weapon recovered from the vehicle. Mr. McBrayer testified that he had no doubt that the three cartridge casings found at the scene were expelled from the recovered Smith and Wesson Model No. 915 weapon when the weapon was fired. Defense counsel objected to McBrayer's testimony regarding the evidence seized from the vehicle during the search incident to defendant's arrest and made a motion to suppress such

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evidence. The trial court denied defendant's motion to suppress and concluded that defendant had no reasonable expectation of privacy to confer standing to contest the search under the Fourth Amendment because defendant did not have a possessory or ownership interest in the vehicle.

Defendant chose not to present evidence and pled not guilty. The jury was properly instructed by the trial court. Following deliberation, the jury convicted defendant of three counts of discharging a weapon into occupied property and one count of assault with a deadly weapon. During defendant's sentencing hearing, the State asserted that it intended to seek a sentence in the aggravated range. Defense counsel objected and asserted that the State did not provide adequate notice that it intended to seek a sentence in the aggravated range for defendant. In response, the State contended that it had given defense counsel written notice of its intent to seek an aggravated sentence at a previous proceeding; however, the district attorney could not recall the date of the proceeding. No written notice was contained in the record on appeal. Defense counsel's objection was overruled by the trial court. During the sentencing hearing, the jury found as an aggravating factor that defendant committed the crimes for which he was convicted while on pretrial release on another charge.

The court then determined the prior record level for felony sentencing and prior conviction level for misdemeanor sentencing purposes to be a total of 6 points, based upon a prior felony conviction for common law robbery (4 points) and two prior misdemeanor convictions for assault on a female (2 points).

The court consolidated two counts of discharging a weapon into occupied property and sentenced defendant to 42 to 60 months' imprisonment. On the third count, the court sentenced defendant to 30 to 45 months' imprisonment to begin at the end of the consolidated sentences. Defendant was also sentenced to 75 days' imprisonment for the assault with a deadly weapon conviction. Defendant timely filed notice of appeal with this Court on 14 May 2009.

**II. Notice of Intent to present Aggravating Factors**

[1] Defendant alleges that the State failed to give him proper written notice of its intent to prove aggravating factors for sentencing pursuant to N.C. Gen. Stat. § 15A-1340.16 (2007) for the three charges of discharging a weapon into an occupied property. We agree.

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Alleged statutory errors are questions of law, *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006), and as such, are reviewed *de novo*. *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999). Section 15A-1340.16(a6) states:

The state must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a prior record level point under G.S. 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

The plain language of the statute requires the State to provide written notice at least 30 days prior to trial of each aggravating factor it seeks to prove.

On appeal, defendant contends that he was improperly sentenced in the aggravated range because the State did not provide proper notice of its intent to present evidence of aggravating factors as required by N.C. Gen. Stat. § 15A-1340.16(a6). The State contends that a letter regarding plea negotiations sent by the State to defendant around 18 October 2007 provided defendant with timely and sufficient written notice of the State's intent to prove the existence of aggravating factors. Defendant acknowledges that plea negotiations occurred but claims that the 18 October 2007 letter did not provide notice that the State intended to present certain aggravating factors. In addition, defendant objected before the trial court to use of the aggravating factor based upon lack of written notice, so he clearly did not waive notice.

The amended record contains a document the State provided defense counsel entitled "Re: State of North Carolina v. LARRY MACKEY Comp. # 07-0820-204003." This document transmitted an "offer" in which the State proposed it would drop the charges contained in No. 07CRS238913, assault with a deadly weapon with intent to kill inflicting serious injury, if defendant would plead guilty to discharging a firearm into occupied property in No. 07CRS238912. The document also indicates the State would have recommended that the court impose an active sentence of 30 to 45 months because the plea of guilty would result in the conviction of the felony listed above at Prior Level III. At the bottom of this form the offer contains the following language:

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Defendant qualifies for aggravated sentencing under 15A-1340.16(d)(8)—creating great risk of death to multiple people 15A-1340.16(d)(12)—offense committed while on pre-trial release 06 CR 257063

This form indicates to a recipient two possible aggravators in connection with this offer: (a) creating great risk of death to multiple people and (b) offense committed while on pretrial release. It does not communicate that in all future discussions these aggravators will be proffered to the court.

The State argues that since the plea offer contained a listing of aggravating factors and prior record level it contended would be submitted with its plea, that this would be substantial compliance with the statutory requirements of N.C. Gen. Stat. § 15A-1340.16(a6) cited above.

We disagree. First, the statutory notice required to notify the defendant of the State's intent to use aggravating factors requires the State to give the defendant notice pursuant to N.C. Gen. Stat. § 15A-1340.16(a6). Nowhere in the document does the plea offer acknowledge that the purpose of the document was to both give notice of aggravating factors *and* communicate an offer. So far as a recipient of this document would be concerned, the language would only communicate a plea offer and nothing more.

In addition, whether defendant's counsel was properly served by the use of a facsimile machine is problematic. For example, the Administrative Office of the Courts has promulgated a Form No. AOC-CR-614 Rev. (3/07), existing at the time, which provides the district attorney with the appropriate statutory language and means of service which complies with the statutory requirements of service of the document on counsel. This form provides that service can be obtained by mail, personal delivery, or by delivery to the office of the attorney. The record indicates a facsimile was sent, but at the trial, defense counsel represented that he had received the offer, but no notice of the aggravating factors. This representation was accurate based on our examination of the documents.

The State had at its disposal a form routinely used by prosecutors to comply with this minimal requirement. Therefore, it had the ability to comply with the statute using regular forms promulgated for this specific purpose by the Administrative Office of the Courts. We are not convinced by the document produced by the State that adequate

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notice was provided to defendant as is required by statute. The argument of the State is not persuasive that its intent to communicate a plea offer was also intended to comply with the N.C. Gen. Stat. § 15A-1340.16(a6). Accordingly, we hold that the trial court erred by sentencing defendant in the aggravated range based upon the State's failure to provide proper written notice to defendant. We therefore reverse the sentence of the trial court as to defendant's convictions of discharging a weapon into an occupied property and remand to the trial court for resentencing.

**III. Motion to Suppress****A. Standard of Review**

The standard of review on appeal from a defendant's motion to suppress is limited to determining whether the trial court's findings are supported by competent evidence, in which case they are binding on appeal, and whether those findings support the trial court's conclusions of law. *State v. Hendrickson*, 124 N.C. App. 150, 153, 476 S.E.2d 389, 391 (1996).

"If no exceptions are taken to findings of fact, 'such findings are presumed to be supported by competent evidence and are binding on appeal.' " *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (citation omitted). Defendant has not assigned error to any of the trial court's findings of fact, so the findings are all binding on appeal. Our only inquiry is whether the findings of fact support the conclusions of law.

With regard to defendant's standing to challenge the legality of a search, the burden rests with defendant to prove that he had a legitimate expectation of privacy in the item that was searched. *Rawlings v. Kentucky*, 448 U.S. 98, 104, 65 L. Ed. 2d 633, 642 (1980).

**B. Analysis**

**[2]** We first determine whether defendant had standing to contest the search of the vehicle by Officer Nickerson. The trial court made the following uncontested findings of fact which are pertinent to defendant's standing to suppress the items found during the search of the vehicle.

1. On August 31, 2007, Officer George Nickerson of the Charlotte Mecklenburg Police Department stopped a vehicle he observed run a traffic light.

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2. There were two occupants in the vehicle, the driver and the defendant riding in the front passenger seat. Officer Nickerson smelled the odor of marijuana coming from the vehicle.
3. Officer Nickerson requested the driver to provide his drivers license and the vehicle registration. The driver was not able to provide either and stated that he had borrowed the vehicle from the owner. When asked his name (driver) and the name of the owner of the vehicle, the driver gave fictitious names.  
....
5. The defendant also gave a fictitious name when he was asked to identify himself. Defendant was removed from the vehicle and seated on the curb about six feet away from the stopped vehicle.
6. Officer Nickerson ran the vehicle tag number with the North Carolina Department of Motor Vehicles and discovered that the registration was not in either of the names given by the driver or the name given by the defendant.
7. Officer Nickerson searched the vehicle and found a small bag under the rear back seat containing a hand gun and marijuana.
8. Officer Nickerson later learned the true identity of the driver and defendant, neither of which matched the name of the registered vehicle owner.
9. Defendant was neither the owner nor driver of the vehicle, but was merely a passenger.
10. Defendant has asserted neither an ownership nor a possessory interest in the vehicle.
11. Defendant has not asserted an ownership nor a possessory interest in the items of evidence seized.

Our Supreme Court has ruled that an occupant of a vehicle has standing to challenge the search of her purse. *See State v. Icard*, 363 N.C. 303, 677 S.E.2d 822 (2009). Based upon these findings of fact, the trial court then concluded that:

1. Standing to claim the protection of the Fourth Amendment guaranty of freedom from unreasonable governmental searches and seizures is based upon the "legitimate expecta-

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tions of privacy” of the individual asserting that right in the place which has allegedly been unreasonably searched.

2. Defendant has the burden of demonstrating an infringement of his Fourth Amendment rights.
3. Defendant has asserted neither an ownership nor a possessory interest in the vehicle.
4. Defendant has neither asserted an ownership nor a possessory interest in any of the evidence seized.
5. Fourth Amendment rights are personal rights which may not be “vicariously” asserted by another.
6. The right to assert a violation of Fourth Amendment rights regarding a search and seizure of property from the vehicle in question, did not belong to the defendant who was not the owner of the vehicle or the driver, but was merely a passenger.
7. Defendant had no “standing” or “legitimate expectations of privacy” with regard to the vehicle searched and the property seized.

Defendant assigns as error the trial court’s conclusion that defendant “did not have standing to contest the search incident to arrest.” He argues that the search of the vehicle was improper under *Arizona v. Gant*, 556 U.S. 332, 173 L. Ed. 2d 485 (2009), and *State v. Carter*, 200 N.C. App. 47, 682 S.E.2d 416 (2009). However, defendant also correctly acknowledges that neither *Gant* nor *Carter* addressed the issue of standing to contest the validity of a search. In those cases, standing was not addressed, as the defendants in each case clearly had standing. Here, we must first consider standing.

Although a passenger who has no possessory interest in the vehicle has standing to challenge the propriety of a stop of the vehicle, *Brendlin v. California*, 551 U.S. 249, 251, 168 L. Ed. 2d 132, 136 (2007) (“When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. . . . We hold that a passenger is seized as well and so may challenge the constitutionality of the stop.”), or to challenge a “detention beyond the scope of the initial seizure,” *State v. Jackson*, 199 N.C. App. 236, 241, 681 S.E.2d 492, 496 (2009), our Courts have never held that a passenger who has no possessory interest in the vehicle or contents has standing to challenge a *search* of the vehicle. Defendant here has not raised any argument regarding the propriety of Officer

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Nickerson's *stop* of the vehicle for running a red light, only the subsequent search. This Court noted in *State v. VanCamp* that

[t]he "rights assured by the Fourth Amendment are personal rights, [which] . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." Standing to claim the protection of the Fourth Amendment guaranty of freedom from unreasonable governmental searches and seizures is based upon the legitimate expectations of privacy of the individual asserting that right in the place which has allegedly been unreasonably invaded.

150 N.C. App. 347, 350, 562 S.E.2d 921, 924 (2002).

In *VanCamp*, the defendant was also a passenger who had no possessory interest in the vehicle. This Court held that

[i]n its order denying defendant's motion to suppress, the trial court correctly concluded as a matter of law that defendant "as a mere passenger in the 1989 Acura, claiming no ownership or possessory interest therein, had no legitimate expectation of privacy in the center console of the vehicle, and therefore, has no standing to assert any alleged illegality of the search thereof."

*Id.* at 350, 562 S.E.2d at 925. In *State v. Warren*, our Supreme Court held that where the vehicle in which the defendant was a passenger was not owned by him, and he "specifically declined to come forward with any evidence of ownership or possession" of the automobile, the trial court was correct in concluding that defendant failed to show a legitimate expectation of privacy." 309 N.C. 224, 227, 306 S.E.2d 446, 449 (1983); *cf. State v. Greenwood*, 301 N.C. 705, 707-08, 273 S.E.2d 438, 440-41 (1981) (holding defendant failed to show search of a pocketbook that did not belong to defendant violated defendant's Fourth Amendment rights); *State v. Jones*, 299 N.C. 298, 261 S.E.2d 860 (1980); *State v. Alford*, 298 N.C. 465, 259 S.E.2d 242 (1979); *Icard*, 363 N.C. 303, 677 S.E.2d 822.

Based upon the uncontested findings of fact, defendant was a passenger who did not own the vehicle, and he asserted no possessory interest in the vehicle or its contents. Under *VanCamp* and *Warren*, the trial court properly concluded that the defendant did not have standing to challenge the search of the vehicle and denied his motion to suppress evidence obtained from the search. Because defendant did not have standing, we need not address defendant's arguments regarding the search.

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**IV. Conclusion**

After review, we conclude that the trial court erred by ruling that the State provided sufficient notice of its intent to seek an aggravated range sentence for defendant. However, we conclude that the trial court properly denied defendant's motion to suppress the evidence found in the vehicle during a lawful search incident to arrest. As such, we affirm the order of the trial court with regard to its ruling on defendant's motion to suppress, but vacate defendant's sentence and remand to the trial court for resentencing in accordance with this opinion.

Vacated and remanded.

Judges JACKSON and STROUD concurred prior to 31 December 2010.

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FIRST MOUNT VERNON INDUSTRIAL LOAN ASSOCIATION, A VIRGINIA INDUSTRIAL  
LOAN ASSOCIATION, PLAINTIFF v. PRODEV XXII, LLC, A VIRGINIA LIMITED LIABILITY  
COMPANY, JONATHAN E. FRIESEN, SUBSTITUTE TRUSTEE, NORRIS G. DILLAHUNT,  
SR. A/K/A NORRIS G. DILLAHUNT AND HELEN M. DILLAHUNT, DEFENDANTS

No. COA10-8

(Filed 4 January 2011)

**1. Appeal and Error— interlocutory orders and appeals—contempt for failure to respond to subpoena—substantial right**

An order holding a non-party in contempt for noncompliance with a discovery order (failure to appear for a deposition after being subpoenaed) affected a substantial right and was immediately appealable.

**2. Contempt— failure to respond to subpoena—findings—willfulness and lack of adequate excuse—distinguished**

The trial court did not err by finding a non-party in willful contempt for not appearing for a deposition after being served with a subpoena. Defendant's contention concerning the failure to find willful disobedience referred to contempt under N.C.G.S. § 5A-11(a)(3) rather than the basis for the court's findings, N.C.G.S. § 1A-1, Rule 45(e). Rule 45(e) refers to the lack of an adequate excuse, of which there was no evidence in this case.

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**3. Contempt—failure to appear at deposition—civil rather than criminal contempt**

A non-party appellant was held in civil rather than criminal contempt where he did not appear for a deposition after being subpoenaed, and the trial court held him in contempt under N.C.G.S. § 1A-1, Rule 45(e). The ultimate purpose of contempt under Rule 45(e) is to obtain compliance with subpoenas issued for the benefit of parties to a civil action.

**4. Contempt—failure to respond to subpoena—sanctions**

The trial court erred by imposing attorney fees as a contempt sanction against a non-party who did not respond to a subpoena and appear at a deposition. Under the plain language of N.C.G.S. § 1A-1, Rules 45(e)(1) and 37(d), parties who fail to obey a subpoena without adequate cause are subject to sanctions.

**5. Attorney Fees—contempt—failure to appear for subpoena—no statutory basis for award**

An award of attorney fees as a contempt sanction against a non-party for failing to respond to a subpoena and appear at a deposition was remanded. The trial court found the non-party in contempt under N.C.G.S. § 1A-1, Rule 45(c), which did not authorize an award of attorney fees under the circumstances of this case.

Appeal by non-party Norris G. Dillahunt, Jr. from orders entered 15 April 2009 and 28 April 2009 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 19 August 2010.

*The Law Offices of Lonnie M. Player, Jr., PLLC, by Lonnie M. Player, Jr., for plaintiff-appellee.*

*Mills & Economos, L.L.P., by Larry C. Economos, for Norris G. Dillahunt, Jr., appellant.*

*No brief filed on behalf of ProDev XXII, LLC.*

GEER, Judge.

Plaintiff First Mount Vernon Industrial Loan Association (“FMV”) and defendant ProDev XXII, LLC each filed motions seeking to have

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non-party appellant Norris G. Dillahunt, Jr. (“Dillahunt”) held in contempt of court under N.C.R. Civ. P. 45(e)(1) for failure to appear for a deposition in accordance with a duly served subpoena. Dillahunt appeals from the orders granting the motions and ordering him, pursuant to N.C.R. Civ. P. 37(d), to pay attorneys’ fees and expenses associated with the deposition and the motion. While the trial court could properly hold Dillahunt in contempt of court under Rule 45(e)(1) for failure, without adequate excuse, to obey the subpoena, we hold that the trial court could not impose sanctions against non-party Dillahunt under Rule 37(d) because Rule 45(e)(1) specifically provides that such sanctions may only be imposed on a party to the action. We, therefore, affirm in part and reverse and remand in part.

**Facts**

Plaintiff FMV commenced this action on 6 May 2008 by filing a complaint against defendants ProDev, substitute trustee Jonathan E. Friesen, Norris G. Dillahunt, Sr., and Helen M. Dillahunt, seeking judicial foreclosure on two pieces of real property and nullification of fraudulent liens. A deed of trust on one of the tracts of property (“the primary property”) secured a note pursuant to which FMV had loaned ProDev \$275,000.00. Norris G. Dillahunt, Sr. and Helen M. Dillahunt (Dillahunt’s parents) had signed a personal guaranty of the note that was secured by an indemnity deed of trust on real property held by the guarantors (“the guaranty property”).

The complaint alleged that ProDev was in default on the note and sought to foreclose on both the primary property and the guaranty property. The complaint further alleged that Norris G. Dillahunt, Sr. had caused certain fraudulent liens to be placed on the guaranty property for the purpose of encumbering the guaranty property and hindering legitimate creditors.

On 8 August 2008, Dillahunt and his wife, Josietta Dillahunt, filed an action against, among others, FMV and ProDev collaterally attacking FMV’s foreclosure action. Dillahunt and his wife alleged that they lived on the primary property. They claimed that title to the primary property had been fraudulently transferred to ProDev and sought to have title returned to them.

On 8 January 2009, Helen M. Dillahunt was deposed in this action. As a result of that deposition, FMV and ProDev determined that they needed to depose Dillahunt, who was not a party to this action. On 13 February 2009, Dillahunt was served with a subpoena and notice of

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video deposition to be held in New Bern, North Carolina on 24 February 2009. Dillahunt failed to appear for the deposition.

On 11 March 2009, FMV filed a motion, pursuant to Rules 45 and 37(d), seeking an order holding Dillahunt in contempt and requiring Dillahunt, in order to purge himself of contempt, to submit to a deposition and to pay FMV's attorneys' fees and costs associated with Dillahunt's failure to comply with the subpoena. On 23 March 2009, ProDev also moved under Rule 45(e) and Rule 37(d) for an order holding Dillahunt in contempt and seeking an award of attorneys' fees. The trial court entered a separate order for each motion.

On 15 April 2009, the court granted FMV's motion. The trial court found that Dillahunt was properly served with the subpoena scheduling his deposition for 24 February 2009, but that Dillahunt failed to appear for that deposition "without good cause and despite his having been subpoenaed to do so." The court found that FMV's expenses associated with the failed deposition and the motion were \$4,600.00. This total included attorneys' fees of \$4,400.00 (representing 16 hours of attorney time billed at \$275.00 per hour) and \$200.00 for the court reporter's appearance fee and preparation of the certificate of non-appearance.

The trial court then made a single conclusion of law:

Having made the preceding Findings of Fact, the Court now, therefore, concludes as a matter of law, pursuant to Rule 45(e)(1) of the North Carolina Rules of Civil Procedure, that the failure of Norris G. Dillahunt, Jr. to comply with the terms of his Deposition Notice and Subpoena without good cause is an omission in contempt of this Court entitling Plaintiff to sanctions as against Mr. Dillahunt, pursuant to Rule 37(d) of the North Carolina Rules of Civil Procedure, inclusive of a charge of the reasonable expenses associated with the failed deposition, including, but not limited to, an assessment of attorney's fees for said failed deposition as well as for the bringing and argument of this motion and Plaintiff, in the amount of \$4,600.00.

The court ordered that Dillahunt could purge himself of the contempt by payment of FMV's fees and costs associated with Dillahunt's failure to comply with the subpoena and with the filing of the motion. The order required Dillahunt to pay the sanction within 30 days of the filing and service of the order. The order did not require Dillahunt to appear for a deposition.

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The trial court granted ProDev's motion on 28 April 2009. In the order, the trial court made substantially the same findings of fact as in the FMV order, although, as to ProDev, the court found that its expenses related to the failed deposition and the contempt motion totaled \$4,277.52. This amount included \$3,878.00 in attorneys' fees (representing 14.8 hours of attorney time billed at \$260.00 per hour) and \$299.52 in mileage reimbursement for travel by counsel from Raleigh to New Bern for both the deposition and the hearing of the contempt motion. The ProDev order included a conclusion of law almost identical to the one in the FMV order. The court similarly ordered that Dillahunt could purge himself of contempt by paying attorneys' fees and expenses to ProDev's counsel within 30 days. This order also did not require that Dillahunt appear for a deposition. Dillahunt appealed to this Court from both orders on 15 May 2009.

Discussion

[1] Dillahunt first contends that the trial court erred in finding him in contempt of court under Rule 45(e)(1) for failing to appear at the deposition scheduled for 24 February 2009.<sup>1</sup> Rule 45(e) provides:

*Contempt; Expenses to Force Compliance With Subpoena. —*

- (1) Failure by any person without adequate excuse to obey a subpoena served upon the person may be deemed a contempt of court. Failure by any party without adequate cause to obey a subpoena served upon the party shall also subject the party to the sanctions provided in Rule 37(d).
- (2) The court may award costs and attorney's fees to the party who issued a subpoena if the court determines that a person objected to the subpoena or filed a motion to quash or modify the subpoena, and the objection or motion was unreasonable or was made for improper purposes such as unnecessary delay.

In reliance upon Rule 45(e)(1), the trial court, after finding Dillahunt in contempt, awarded attorneys' fees under Rule 37(d), which states:

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1. While this appeal is interlocutory since the action is still pending, an order holding a party "in contempt for noncompliance with a discovery order or . . . [assessing them] with certain other sanctions," affects a substantial right and is thus immediately appealable. *Cochran v. Cochran*, 93 N.C. App. 574, 576, 378 S.E.2d 580, 581 (1989).

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*Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.*—If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (i) to appear before the person who is to take his deposition, after being served with a proper notice, or (ii) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (iii) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions a, b, and c of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

[2] Dillahunt first argues that the trial court's determination that he was in contempt was not supported by sufficient findings of fact because the order contained no finding that he was "willfully disobedient" in failing to attend the scheduled deposition. Dillahunt appears to be basing his contention on general contempt law. In his brief, Dillahunt cites N.C. Gen. Stat. § 5A-11(a)(3) (2009), which defines "criminal contempt" as including "[w]illful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution." The trial court, however, did not base its contempt order on N.C. Gen. Stat. § 5A-11(a)(3), but rather on Rule 45(e).<sup>2</sup>

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2. [3] While both Dillahunt and FMV contend that Dillahunt was held in criminal, and not civil, contempt, we disagree. This Court has stated that "since the [F]ederal . . . [R]ules [of Civil Procedure] are the source of [the North Carolina Rules of Civil Procedure], we will look to the decisions of [federal courts] for enlightenment and guidance." *Moody v. Sears Roebuck & Co.*, 191 N.C. App. 256, 266, 664 S.E.2d 569, 576 (2008) (quoting *Sutton v. Duke*, 277 N.C. 94, 101, 176 S.E.2d 161, 165 (1970)). Fed. R. Civ. P. 45(e) is essentially identical to the first sentence of the North Carolina version of Rule 45(e). The comment to the federal rule states: "The contempt most often associated with the disobedience of a subpoena is the category of 'civil' contempt, the purpose of which is to enforce compliance in the particular case, with any penalty imposed designed to further the rights of the party in whose behalf the subpoena issued." Fed. R. Civ. P. 45(e) cmt. C45-26. See also *United States S.E.C. v. Hyatt*, 621 F.3d 687, 692-93 (7th Cir. 2010) (stating that contempt under Rule 45(e) is civil contempt); *Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1342 (8th Cir. 1975) (characterizing contempt for failure to comply with subpoena issued under Rule 45 as

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The plain language of Rule 45(e) does not require willful disobedience, but rather provides that a “[f]ailure by any person *without adequate excuse* to obey a subpoena served upon the person may be deemed a contempt of court.” (Emphasis added.) Indeed, Dillahunt cites no authority requiring a finding of “willful disobedience” when the contempt order is based on Rule 45(e).

It is an established rule of statutory construction that when “a statute is intelligible without any additional words, no additional words may be supplied.” *State v. Camp*, 286 N.C. 148, 151, 209 S.E.2d 754, 756 (1974). As Rule 45(e) contains no express requirement of willfulness, we may not impose such a requirement. *See American Imps., Inc. v. G.E. Employees W. Region Fed. Credit Union*, 37 N.C. App. 121, 124, 245 S.E.2d 798, 800 (1978) (refusing to require finding of willfulness as precondition to imposing sanctions under Rule 37(d) when rule did not include any language referring to willfulness). Consequently, the trial court was required, in this case, to determine only whether Dillahunt lacked “adequate cause” for failing to comply with the deposition subpoena.

Dillahunt does not, however, address whether the trial court had a basis for finding that he lacked adequate cause for failing to comply with the subpoena. At the hearing, Dillahunt presented no evidence explaining his absence. He neither submitted an affidavit nor provided sworn live testimony at the hearing. On appeal, in arguing that he was not “willfully disobedient” in failing to appear for the deposition, Dillahunt relies only upon his own unsworn statements made during oral argument, claiming that his attorney sent him an email that implied the deposition had been postponed for one week. Unsworn statements during oral argument are not evidence. *See Ronald G. Hinson Elec., Inc. v. Union County Bd. of Educ.*, 125 N.C. App. 373, 379, 481 S.E.2d 326, 330 (1997) (stating that “[unsworn] statements by a party’s attorney at trial are not considered evidence”).<sup>3</sup>

This Court’s review of contempt orders “is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.” *Adkins v. Adkins*, 82 N.C.

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being “civil in nature”). Because the ultimate purpose of holding an individual in contempt under Rule 45(e) is to obtain compliance with subpoenas issued for the benefit of parties to a civil action, it is civil in nature.

3. Statements by Dillahunt may, however, be relied upon by opposing parties FMV and ProDev as admissions under Rule 801 of the Rules of Evidence.

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App. 289, 292, 346 S.E.2d 220, 222 (1986). Thus, as the record contains no evidence of an adequate excuse for Dillahunt's failure to comply with the subpoena, we must uphold the trial court's finding of fact that Dillahunt lacked an adequate excuse and its decision, based on that finding, to hold Dillahunt in contempt of court pursuant to Rule 45(e) for failure to comply with the deposition subpoena.

[4] Dillahunt next argues that, even if the trial court properly held him in contempt, the court erred in imposing sanctions under Rule 37(d) because he was not a party to the action. The first sentence of Rule 45(e)(1) allows a court to hold "any person" in contempt of court. The second sentence, however, provides that when "any party" fails without adequate cause to obey a subpoena served upon "the party," then "the party" is subject to the sanctions set out in Rule 37(d). Dillahunt argues that by referencing "any person" in the first sentence, but "any party" in the second sentence, the General Assembly was expressing an intent to limit the imposition of Rule 37(d) sanctions for violation of a subpoena to parties to the action. We agree.<sup>4</sup>

"‘Statutory interpretation properly begins with an examination of the plain words of the statute.’" *State v. Byrd*, 363 N.C. 214, 219, 675 S.E.2d 323, 325 (2009) (quoting *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). "Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep’t of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009).

Here, the General Assembly could have referred to "any person" throughout Rule 45(e)(1), but chose to use the more limiting language of "any party" when talking about Rule 37(d) sanctions. This distinction makes sense as the plain language of Rule 37(d) itself is limited to parties and individuals appearing for a deposition on behalf of parties pursuant to Rule 30(b)(6) or 31(a). Rule 37(d) also authorizes sanctions for conduct that can only be committed by a party, such as a failure to respond to interrogatories.

Rule 37(a) demonstrates further that the General Assembly has purposefully distinguished between parties and non-parties. Rule 37(a) provides for the filing of motions to compel discovery, and Rule 37(a)(1) specifies that such a motion may be directed "to a party or a deponent who is not a party." Rule 37(a)(2) states that "the discovering party may move for an order" compelling discovery "[i]f a

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4. FMV has conceded this error in its appellee brief.

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deponent fails to answer a question propounded or submitted under Rules 30 or 31" or if "a party" fails to answer an interrogatory or fails to permit inspection of documents.

Because Dillahunt was not a party, he was not subject to sanctions under Rule 37(d). We hold that the trial court, therefore, erred in basing its award of attorneys' fees and costs on Rule 37(d).

We note that under Rule 37(a)(4), "[i]f the motion is granted, the court shall, after opportunity for hearing, require the party *or deponent* whose conduct necessitated the motion or the party advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." (Emphasis added.) Consequently, if FMV and ProDev had filed a motion to compel Dillahunt to appear for his deposition under Rule 37(a), the trial court, upon granting the motion, could have awarded attorneys' fees and expenses as provided under Rule 37(a)(4).

We cannot, however, rely upon Rule 37(a)(4) as a basis for upholding the decision below. FMV's and ProDev's motions did not cite Rule 37(a), the trial court specifically based its decision on Rule 37(d), and the trial court's orders did not compel Dillahunt to submit to the deposition.

**[5]** Even though the trial court could not require Dillahunt to pay attorneys' fees as a sanction under Rule 37(d), we must consider whether the trial court had authority to award attorneys' fees as part of its contempt power. Our courts have consistently held that a court may not require that a person held in contempt pay the opposing party's attorneys' fees in the absence of a statute authorizing the award of attorneys' fees.

In *Blevins v. Welch*, 137 N.C. App. 98, 103, 527 S.E.2d 667, 671 (2000) (quoting *Glesner v. Dembrosky*, 73 N.C. App. 594, 599, 327 S.E.2d 60, 63 (1985)), this Court explained that "[g]enerally speaking, '[a] North Carolina court has no authority to award damages to a private party in a contempt proceeding. Contempt is a wrong against the state, and moneys collected for contempt go to the state alone.' " Our courts may only award attorneys' fees in contempt matters "when specifically authorized by statute." *Id.* (reversing award of attorneys' fees because, in contempt actions involving easements, "there is no specific statutory authorization for the award of attorney's fees"). See

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*also Moss Creek Homeowners Ass'n v. Bissette*, 202 N.C. App. 222, 233-34, 689 S.E.2d 180, 188 (reversing award of attorneys' fees incurred in enforcing trial court's contempt orders because "[c]ourts can award attorneys' fees in contempt matters only when specifically authorized by statute"), *disc. review denied*, 364 N.C. 242, 698 S.E.2d 402 (2010); *Watson v. Watson*, 187 N.C. App. 55, 69, 652 S.E.2d 310, 320 (2007) ("Generally, attorney's fees and expert witness fees may not be taxed as costs against a party in a contempt action."), *disc. review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008); *Sea Ranch II Owners Ass'n v. Sea Ranch II, Inc.*, 180 N.C. App. 230, 234, 636 S.E.2d 307, 309 (2006) ("Courts can award attorney fees in contempt matters only when specifically authorized by statute."), *disc. review denied*, 361 N.C. 357, 644 S.E.2d 233 (2007).

FMV has not cited any statutory authorization for an award of attorneys' fees based on a finding of contempt under Rule 45(e). We recognize that Rule 45(e)(2) does provide for an award of "costs and attorney's fees to the party who issued a subpoena if the court determines that a person objected to the subpoena or filed a motion to quash or modify the subpoena, and the objection or motion was unreasonable or was made for improper purposes such as unnecessary delay." Here, however, Dillahunt neither objected to the subpoena nor moved to quash the subpoena, as provided in Rule 45(c), and, therefore, Rule 45(c) cannot support the decision below.

We observe, however, that it does not seem reasonable that fees can be awarded with respect to a person who acknowledges but opposes the subpoena, while fees cannot be awarded when a person wholly disregards the subpoena. Nonetheless, given the specific language of Rule 45(e)(2), it does not authorize an award of attorneys' fees under the circumstances in this case. This is a discrepancy that the General Assembly may want to revisit.

Still, we agree with the comment to the federal Rule 45:

It is the contempt remedy that backs a subpoena. There is nothing new about that. When the subpoenaed person is not a party to the action, the threat of contempt is the only remedy, whether the disobedience is of the subpoena itself or of a court order entered somewhere further along the way directing the nonparty to do something. With a party there may be a variety of other sanctions available as well—in the case of a party, more often for the disobedience of a court order than of a subpoena—up to and including the declaration of a default,

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see Rule 37(b)(2), but these are threats that impact on the party's interests in the action and they therefore hold no terror for a nonparty. Hence the special role that contempt plays in enforcing subpoenas against nonparty witnesses.

Fed R. Civ. P. 45 cmt. C45-26. Therefore, we must remand to the trial court for a determination of the appropriate sanction given Dillahunt's disregard of the subpoena in this case.

In sum, the trial court properly concluded that Dillahunt was in contempt of court under Rule 45(e) for failing to comply with the subpoena without adequate cause. The court was not, however, permitted to award FMV and ProDev attorneys' fees as part of its order holding Dillahunt in contempt. Therefore, although we affirm the trial court's decision to hold Dillahunt in contempt, we must reverse the award of attorneys' fees and costs and remand both orders for further proceedings regarding the appropriate sanction.

Affirmed in part; reversed and remanded in part.

Judges JACKSON and BEASLEY concur.

Judge JACKSON concurred prior to 31 December 2010.

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JAMES ERIC POOLE AND WILLIAM SETH MARLOWE, PLAINTIFFS v. BAHAMAS SALES ASSOCIATE, LLC, GINN FINANCIAL SERVICES, LLC, THE GINN COMPANIES, LLC, GINN DEVELOPMENT COMPANY, LLC, GINN DEVELOPMENT INTERNATIONAL, LLC, GINN REAL ESTATE COMPANY, LLC, GINN-LA WEST END, LIMITED CORP., GINN-LA GLADYS FORK LTD., LLLP, LA-GLADYS FORK GP, LLC, GINN-LA LAUREL CREEK LTD., LLLP, GINN-LAUREL CREEK GP, LLC, GINN CONSTRUCTION COMPANY, LLC, GINN LAURELMOR CONDOMINIUMS, LLC, THE CLUB AT LAURELMOR, LLC, GINN-LA CS BORROWER, LLC, GINN-LA CS HOLDING COMPANY, LLC, DEFENDANTS

No. COA10-394

(Filed 4 January 2011)

**1. Mortgages and Deeds of Trust—anti-deficiency statute—action brought prematurely—dismissal proper**

The trial court did not err by dismissing plaintiffs' claim for relief based on defendants' alleged violation of N.C.G.S. § 45-21.38, the "anti-deficiency" statute, pursuant to N.C.G.S.

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§ 1A-1, Rule 12(b)(6). Where plaintiffs' injury was merely theoretical or anticipated, the action was brought prematurely.

**2. Loans—liability under note—declaratory judgment requested—preferable forum—choice-of-law—dismissal**

The trial court did not err by dismissing plaintiffs' claim for relief requesting that the trial court declare the nonexistence of their personal liability under an adjustable rate balloon note. The plain language of plaintiffs' brief suggested that plaintiffs' decision to file the present action in this jurisdiction was merely a strategic maneuver to achieve a preferable forum or, at a minimum, was an attempt to circumvent a choice-of-law provision agreed to by the parties which would otherwise subject them to the laws of the State of Florida.

Appeal by plaintiffs from order entered 29 December 2009 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 October 2010.

*Bishop, Capitano & Moss, P.A., by J. Daniel Bishop, for plaintiffs-appellants.*

*Doughton & Hart PLLC, by Thomas J. Doughton and Amy L. Rich, for defendants-appellees.*

MARTIN, Chief Judge.

Plaintiffs James Eric Poole and William Seth Marlowe appeal from the trial court's order dismissing with prejudice their Complaint and First Amended Complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). For the reasons stated, we affirm.

On 25 March 2009 and 14 December 2009, plaintiffs filed a Complaint and First Amended Complaint, respectively, against sixteen named defendants, including The Ginn Companies, LLC ("defendant Ginn"), Ginn Financial Services, LLC ("defendant GFS"), Bahamas Sales Associate, LLC ("defendant BSA"), and Ginn-LA West End, Limited Corp. ("defendant Ginn-LA West End"). According to plaintiffs, defendant BSA is a Delaware limited liability company with its principal place of business in Florida, and is wholly-owned by defendant GFS. Defendant GFS is a Georgia limited liability company domesticated in North Carolina, and is wholly-owned by defendant Ginn. Defendant Ginn is a Delaware limited liability company. All remaining named defendants are alleged to be (1) wholly-owned sub-

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sidiaries or corporate affiliates of defendant Ginn, (2) organized under the laws of Georgia, Delaware, or the Bahamas, (3) domesticated in North Carolina,<sup>1</sup> and (4) collectively referred to as the “Ginn Network Entities.”

In October 2006, plaintiffs executed a Contract for Lot Purchase (the “Contract”) with defendant Ginn-LA West End, in which defendant Ginn-LA West End agreed to sell plaintiffs a residential resort lot in the Ginn Sur Mer Club & Resort development—designated as the “Versailles Sur Mer” development in the Complaint and First Amended Complaint—on Grand Bahama Island in the Commonwealth of the Bahamas for \$575,900.00. Plaintiffs alleged that they paid cash consideration in the amount of \$115,200.00 and, in December 2006, plaintiffs obtained financing for the balance of the purchase price in an Adjustable Rate Balloon Note (the “Note”) from defendant BSA for the principal amount of \$460,720.00. In January 2007, defendant Ginn-LA West End conveyed the subject property to plaintiffs by an Indenture of Conveyance. On the same day, plaintiffs granted an Indenture of Mortgage to defendant BSA for the amount specified in the Note. Both documents were filed and recorded with the Bahamas Registrar General.

Plaintiffs alleged that, because some of the Ginn Network Entities “defaulted on terms of their own development indebtedness in connection with Versailles Sur Mer[,] . . . development plans for the resorts have been altered, limited and circumscribed, severely impairing the expected value of the lot sold to [p]laintiffs.” Consequently, plaintiffs alleged that “it became impracticable for [plaintiffs] to service or pay the Note.” Plaintiffs did not allege that defendants commenced any action to enforce the Note, and did not allege that defendants instituted foreclosure proceedings upon plaintiffs’ default. Nevertheless, plaintiffs claim that defendants violated North Carolina’s “anti-deficiency” statute under N.C.G.S. § 45-21.38, committed unfair and deceptive trade practices in violation of N.C.G.S. § 75-1.1, and requested that the trial court declare “the nonexistence of [p]laintiffs’ personal liability under the Note.”

Defendants moved to dismiss plaintiffs’ Complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1), (3), and (6). The trial court denied defendants’ motions under Rule 12(b)(1) and (3), but allowed defend-

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1. Defendant Ginn-LA West End, a Bahamas corporation, and defendants Ginn-LA CS Borrower, LLC and Ginn-LA CS Holding Company, LLC, each a Delaware limited liability company, are not alleged to be domesticated in North Carolina.

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ants' motion under Rule 12(b)(6) "on the grounds that the Complaint and First Amended Complaint fail to state a claim upon which relief can be granted because the matter alleged is not ripe." After the trial court dismissed plaintiffs' Complaint and First Amended Complaint with prejudice, plaintiffs filed timely notice of appeal.

"A motion to dismiss made pursuant to G.S. 1A-1, Rule 12(b)(6) tests the legal sufficiency of the complaint." *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citing *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970)). "The question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Id.* (citing *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979), *disapproved of on other grounds by Dickens v. Puryear*, 302 N.C. 437, 448, 276 S.E.2d 325, 332 (1981)). "In general, 'a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.'" *Id.* at 670-71, 355 S.E.2d 840 (emphasis in original omitted) (quoting *Stanback*, 297 N.C. at 185, 254 S.E.2d at 615). "Such a lack of merit may consist of the disclosure of facts which will necessarily defeat the claim as well as where there is an absence of law or fact necessary to support a claim." *Id.* at 671, 355 S.E.2d at 840-41.

[1] Plaintiffs first contend the trial court erred by dismissing their first claim for relief pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) because defendants' alleged violation of N.C.G.S. § 45-21.38, the "anti-deficiency" statute, caused injury to plaintiffs "that is neither theoretical nor anticipated, but existing." We disagree.

N.C.G.S. § 45-21.38 provides:

In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money

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for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out.

N.C. Gen. Stat. § 45-21.38 (2009). The “manifest intention” of this statute is “to limit the creditor to the property conveyed when the note and mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price.” *Ross Realty Co. v. First Citizens Bank & Tr. Co.*, 296 N.C. 366, 370, 250 S.E.2d 271, 273 (1979); *see also id.* at 371, 250 S.E.2d at 274 (“[The General Assembly’s intent in enacting the statute was] to protect vendees from oppression by vendors and mortgagors from oppression by mortgagees.”). In furtherance of this intention, “[t]he statute, G.S. § 45-21.38 makes the seller liable *for losses which the purchaser sustains* because of seller’s failure to insert a statement that debt is for purchase money in a note and deed of trust prepared by it or under its supervision.” *Childers v. Parker’s Inc. (Childers I)*, 259 N.C. 237, 238, 130 S.E.2d 323, 324 (1963) (emphasis added). Our Supreme Court has determined that a “purchaser has not sustained a loss as contemplated by the statute *until he has been compelled to pay or judgment has been rendered fixing his liability*” “[w]here there has been a foreclosure and the proceeds are insufficient to pay the amount called for in the note.” *Id.* (emphasis added).

In *Childers I*, plaintiffs instituted an action in which they sought to recover “the sum they anticipate[d] they may be compelled to pay to a third party because of the asserted failure of defendant to state in a note and deed of trust given by plaintiffs that the instruments were for the purchase of the land described in the deed of trust.” *Id.* at 237, 130 S.E.2d at 323. In that case, plaintiffs alleged that a party “had demanded payment of the balance owing on [a] note and threatened suit unless said sum was paid. [However, p]laintiffs offered no evidence to support these allegations.” *Id.* at 238, 130 S.E.2d at 324 (emphasis added). “Plaintiffs [also] offered no evidence of payment or judgment fixing their liability. To the contrary[, plaintiffs’] allegations show[ed] no loss ha[d] as yet been incurred. At most plaintiffs show[ed only] a potential loss.” *Id.* (emphasis added). Thus, the Court concluded that “[t]his [wa]s not sufficient” to establish that

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plaintiffs had sustained a loss as contemplated by N.C.G.S. § 45-21.38. *See id.* Therefore, because the action was “instituted prior to the time plaintiffs’ liability . . . had been established, [the appeal] was dismissed because prematurely brought.” *Childers v. Parker’s, Inc. (Childers II)*, 274 N.C. 256, 259, 162 S.E.2d 481, 483 (1968) (citing *Childers I*, 259 N.C. at 238, 130 S.E.2d at 324).

In the present case, plaintiffs alleged that the Note was “prepared under the direction and supervision of [d]efendants” and that, “[i]n violation of [N.C.G.S. § 45-21.38], [d]efendants failed to cause a provision to be inserted in the Note disclosing that it was for purchase money of real estate[.]” Plaintiffs requested that the trial court enter “[a] money judgment against [d]efendants, jointly and severally, for actual damages not less than \$460,720, trebled, setting off and recouping against the amount of any liability arising under the Note.” However, in the present case, plaintiffs admit that defendants have neither instituted foreclosure proceedings against them nor commenced any action to enforce the Note. We do not discern any relevant distinction between plaintiffs’ allegations in the present case and those in *Childers I*. Therefore, assuming without deciding that plaintiffs may be entitled to protection under the statute, “notwithstanding that the property [at issue] is located in the Bahamas and [that d]efendants included a Florida choice-of-law clause in the Note,” we conclude that this action, like the action in *Childers I*, was “prematurely brought” and the trial court did not err by dismissing plaintiffs’ first claim for relief. *See Childers II*, 274 N.C. at 259, 162 S.E.2d at 483 (citing *Childers I*, 259 N.C. at 238, 130 S.E.2d at 324).

**[2]** Plaintiffs next contend the trial court erred by dismissing their third claim for relief<sup>2</sup> requesting that the trial court “declare the nonexistence of [p]laintiffs’ personal liability under the Note” because they allege that “litigation seeking to impose personal liability under the Note is practically inevitable.” Plaintiffs assert that their allegations in support of this claim “reveal[] the existence of an actual controversy.” Again, we disagree.

Although a motion to dismiss under Rule 12(b)(6) “is seldom an appropriate pleading in actions for declaratory judgments, . . . [i]t is allowed . . . when the record clearly shows that there is no basis for

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2. Plaintiffs did not bring forward any argument that the trial court erred by dismissing their claim that defendants committed unfair and deceptive trade practices. Therefore, we leave the trial court’s dismissal as to this claim undisturbed. *See N.C.R. App. P. 28(a)* (“The scope of review on appeal is limited to issues . . . presented in the several briefs.”).

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declaratory relief as when the complaint does not allege an actual, genuine existing controversy.” *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 439, 206 S.E.2d 178, 182 (1974). “It is not necessary for one party to have an actual right of action against another for an actual controversy to exist which would support declaratory relief. However, it is necessary that the Courts be convinced that the litigation appears to be unavoidable.” *Id.* at 450, 206 S.E.2d at 189. “Mere apprehension or the mere threat of an action or a suit is not enough.” *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 62 (1984).

Additionally, while “[a] declaratory proceeding can serve a useful purpose where the plaintiff seeks to clarify its legal rights in order to prevent the accrual of damages, or seeks to litigate a controversy where the real plaintiff in the controversy has either failed to file suit, or has delayed in filing[,] . . . a declaratory suit should not be used as a device for ‘procedural fencing.’” *Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co.*, 141 N.C. App. 569, 578-79, 541 S.E.2d 157, 164 (2000), *disc. review denied*, 353 N.C. 370, 547 S.E.2d 433 (2001). For instance, “[a] defendant in a pending lawsuit should not be permitted to bring a declaratory suit involving overlapping issues in a different jurisdiction as a strategic means of obtaining a more preferable forum.” *Id.* at 579, 541 S.E.2d at 164. “Otherwise, the natural plaintiff in the underlying controversy would be deprived of its right to choose the forum and time of suit.” *Id.* “Furthermore, it is inappropriate for a potential tortfeasor to bring a declaratory suit against an injured party for the sole purpose of compelling the injured party ‘to litigate [its] claims at a time and in a forum chosen by the alleged tortfeasor.’” *Id.* (alteration in original) (quoting *Cunningham Bros., Inc. v. Bail*, 407 F.2d 1165, 1167 (7th Cir.), *cert. denied*, 395 U.S. 959, 23 L. Ed. 2d 745 (1969)).

Here, plaintiffs alleged that defendants BSA and GFS “have threatened, in lieu of foreclosing, to commence an action to enforce the Note,” and demanded payment of all outstanding principal, accrued interest, and fees in a letter, which stated: “Note Holder reserves the right to exercise any or all of the rights and remedies available to it, including, but not limited to, initiating legal proceedings against you.” The record further indicates that, although the Note expressly provides that its terms do not prevent the Lender, defendant BSA, from “bringing any action or exercising any rights within any other state or jurisdiction,” the Note contains a choice-of-law provision declaring that it “shall be governed by and interpreted in

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accordance with the law of the State of Florida.” Based on these allegations, plaintiffs assert that “litigation—*in Florida*—is a practical inevitability,” (emphasis added), and so seek to have a North Carolina trial court declare that the “anti-deficiency” statute relieves plaintiffs of any personal liability that they *may* incur on the Note *if* defendants foreclose on the subject property and *if* the proceeds from the foreclosure are insufficient to pay the balance of the Note and *if* plaintiffs are later compelled to pay the deficiency *or if* judgment is rendered fixing plaintiffs’ liability. In their brief, plaintiffs assert that “[d]efendants will assuredly enforce the obligation in a Florida court” and seek to have a North Carolina court declare the applicability of N.C.G.S. § 45-21.38 because they argue that a Florida court “would not subordinate the Florida choice-of-law clause in the Note to the legislative purpose of the North Carolina anti-deficiency statute,” and would thus “depriv[e] the North Carolina resident [p]laintiffs of the protection intended by the statute.” However, “[w]e cannot condone using the Declaratory Judgment Act to obtain a more preferable venue in which to litigate a controversy. Such ‘procedural fencing’ deprives the natural plaintiff of the right to choose the time and forum for suit.” *See Coca-Cola Bottling Co. Consol.*, 141 N.C. App. at 581, 541 S.E.2d at 165. Since the plain language of plaintiffs’ brief suggests that plaintiffs’ decision to file the present action in this jurisdiction “is merely a strategic maneuver to achieve a preferable forum,” *see id.* at 579, 541 S.E.2d at 164, or, at a minimum, is an attempt to obligate a foreign jurisdiction to give full faith and credit to a judgment applying the laws of this jurisdiction in order to circumvent a choice-of-law provision agreed to by the parties which would otherwise subject them to the laws of the State of Florida, we conclude that the trial court did not err by denying plaintiffs’ request for a declaratory judgment and dismissing plaintiffs’ claim with prejudice. Our disposition renders it unnecessary to address plaintiffs’ remaining arguments or defendants’ cross-issues on appeal.

Affirmed.

Judges STEPHENS and STROUD concur.

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[209 N.C. App. 144 (2011)]

STATE OF NORTH CAROLINA v. JOSHUA JAMES PARLEE

No. COA10-497

(Filed 4 January 2011)

**1. Homicide— second-degree murder—sufficient evidence**

The trial court did not err by failing to dismiss the charge of second-degree murder as there was sufficient evidence of all elements of the charge, including (1) malice; (2) that defendant's actions proximately caused the victim's death; and (3) that the victim "ingested" the Oxymorphone pill.

**2. Appeal and Error— preservation of issues—constitutional argument—not raised at trial—no merit**

Defendant waived appellate review of his argument that he received multiple punishments for the same act in violation of the Double Jeopardy Clauses of the United States and North Carolina Constitutions where defendant raised no objection based upon double jeopardy at trial. Even assuming *arguendo* that the issue was properly preserved, second-degree murder and sale or delivery of a controlled substance to a juvenile are not identical offenses for purposes of double jeopardy.

**3. Evidence— relevance—admission—no prejudice**

The trial court did not err in a second-degree murder case by admitting evidence regarding the manner in which defendant's mother obtained Oxymorphone pills where defendant failed to articulate how this evidence prejudiced his trial.

Appeal by defendant from judgments entered 18 September 2009 by Judge Joseph Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 26 October 2010.

*Attorney General Roy Cooper, by Assistant Attorney General LaToya B. Powell, for the State.*

*Richard E. Jester, for defendant-appellant.*

STEELMAN, Judge.

Where the State introduced evidence that defendant knew the drug that he sold to two minors was inherently dangerous, there was sufficient evidence of malice to submit the charge of second-degree

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murder to the jury. Where defendant supplied Oxymorphone to the victim and that person died of an acute Oxymorphone overdose, the State presented sufficient evidence that defendant's actions were the proximate cause of death to submit the charge of second-degree murder to the jury. Where the victim died of an acute Oxymorphone overdose, the State was not required to prove the specific manner in which the substance was introduced into his body. Where the constitutional issue of double jeopardy was not raised at trial, it is not preserved for appellate review. To prevail on appeal based upon an evidentiary ruling of the trial court, defendant is required to show both error and prejudice pursuant to N.C. Gen. Stat. § 15A-1443(a).

**I. Factual and Procedural Background**

On 11 January 2008, Matt<sup>1</sup> rode the bus to Nate's residence, his friend and schoolmate. At approximately 7:00 p.m., Nate's mother drove them to a movie theater in Mooresville. While at the theater, Nate and Matt saw Joshua Parlee (defendant). Nate learned that defendant had prescription medication and approached defendant to buy a pill. Defendant stated that he had one pill left and that he would sell it to Nate. Matt was standing next to Nate while this conversation took place. Matt handed Nate a \$20.00 bill. Nate gave the money to defendant in exchange for one Oxymorphone pill. Defendant told Nate that the pill was "Oxymorphone and that it's pretty strong pain medication." Defendant also told Nate not to "do anything destructive with it" and not to take a whole pill at once. Nate put the pill in his pocket, and they went outside to wait for Nate's mother to pick them up.

When they returned to Nate's residence, Matt and Nate played video games and watched movies until Nate's mother went to sleep. At approximately 11:00 p.m., Matt and Nate smoked marijuana. Thereafter, Nate split the Oxymorphone pill in half, ingested his half, and gave the other half to Matt. Nate ingested the pill by chewing it up and swallowing it with water. Nate did not see Matt ingest his half of the pill. After ingesting half of the pill, Nate felt "high" and remembered playing video games. The next thing Nate remembered was seeing flashing lights in front of his eyes and people asking him questions. Nate was hospitalized for nine days.

When police and EMS arrived on 12 January 2008 at approximately 9:46 a.m., Matt was deceased. Paramedics determined that

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1. The State's and defendant's briefs identify the minors involved in this case by the pseudonyms Matt and Nate. We continue this mode of identification.

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Matt had been dead for approximately three hours. A toxicology report revealed the presence of Oxymorphone in Matt's blood. The cause of death was an acute Oxymorphone overdose.

On 28 April 2008, defendant was indicted for second-degree murder, possession of a controlled substance with intent to sell and deliver, and sale or delivery of a controlled substance to a person under 16, but more than 13 years old. Defendant's case was called for trial on 9 September 2009. Defendant pled guilty to the offense of possession with intent to sell or deliver a Schedule II controlled substance. The jury found defendant guilty of the other two offenses. The trial court found defendant to be a prior record level II for felony sentencing purposes. Defendant was sentenced to 151 to 191 months imprisonment for the second-degree murder conviction. The trial court consolidated the remaining convictions and sentenced him to 61 to 83 months imprisonment to be served consecutively to the sentence for second-degree murder.

Defendant appeals.

**II. Motion to Dismiss—Second-Degree Murder Charge**

[1] In his first argument, defendant contends that the trial court erred by failing to dismiss the charge of second-degree murder based upon the sufficiency of the evidence. We disagree.

**A. Standard of Review**

“Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). We view the evidence “in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.” *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (internal citations and quotation omitted).

**B. Analysis**

In North Carolina, a murder proximately caused by “the unlawful distribution of opium or any synthetic or natural salt, compound,

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derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine, when the ingestion of such substance causes the death of the user" is second-degree murder. N.C. Gen. Stat. § 14-17 (2007). Defendant contends that the State failed to prove: (1) malice; (2) that defendant's actions proximately caused Matt's death; or (3) that Matt "ingested" the Oxymorphone pill. We address each contention in turn.

i. Malice

"Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Page*, 346 N.C. 689, 698, 488 S.E.2d 225, 231 (1997) (citations omitted), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d 651 (1998). Our Supreme Court has held that the State is required to prove malice for a conviction of second-degree murder based upon the unlawful distribution of a controlled substance pursuant to N.C. Gen. Stat. § 14-17. *State v. Davis*, 305 N.C. 400, 426, 290 S.E.2d 574, 590 (1982). "[T]he malice necessary to support a conviction for second-degree murder does not necessarily mean an actual intent to take human life." *State v. Liner*, 98 N.C. App. 600, 605, 391 S.E.2d 820, 822 (quotation omitted), *disc. review denied*, 327 N.C. 435, 395 S.E.2d 693 (1990). Malice can arise "when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief." *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982) (citation omitted).

In *Liner*, this Court addressed the sufficiency of the evidence of malice required to support a conviction for second-degree murder based upon the defendant supplying the victim with a controlled substance. 98 N.C. App. at 605, 391 S.E.2d at 822. In that case, the defendant provided three individuals with Dilaudid hydrochlorine. *Id.* at 603, 391 S.E.2d at 821. The first individual used the substance, and subsequently turned "deathly white" and stopped breathing. *Id.* The defendant administered mouth-to-mouth resuscitation and the individual later recovered. *Id.* Approximately one week later, the defendant provided the substance to a second individual, who became very ill and told the defendant he "wasn't going to do anymore, that it was bad." *Id.* The next day, the defendant went to the home of the victim and provided him with Dilaudid hydrochlorine. *Id.* at 604, 391 S.E.2d at 822. After snorting the substance, the victim died. *Id.*

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The defendant was convicted of second-degree murder pursuant to N.C. Gen. Stat. § 14-17. *Id.* On appeal, the defendant argued that the trial court should have dismissed the charge because the State failed to produce sufficient evidence of malice. *Id.* at 605, 391 S.E.2d at 822. This Court held that “the evidence tends to show that defendant supplied the drugs to the victim . . . with the knowledge that the drugs were inherently dangerous due to the fact that Steve Dixon and Paul David Barbee had both become violently ill after using the drugs in defendant’s presence.” *Id.* We held that the jury could have reasonably inferred that the defendant acted with malice in supplying the controlled substance to the victim. *Id.*

In the light most favorable to the State, the evidence in the instant case tended to show that Nate and Matt approached defendant to purchase prescription medication. Defendant agreed to sell them an Oxymorphone pill for \$20.00. When defendant gave Nate and Matt the pill he told them the following: (1) that the pill was “Oxymorphone and that it’s pretty strong pain medication[;]” and (2) not to take a whole pill or “do anything destructive with it.” Further, defendant stated to a friend on the night in question that he liked Oxymorphone because it “messe[d] him up.

While the facts of this case are less compelling than those present in *Liner*, we hold that in the light most favorable to the State, the jury could have reasonably inferred from the evidence presented that defendant knew Oxymorphone was an inherently dangerous drug and acted with malice when he supplied Nate and Matt with the Oxymorphone pill.

ii. Proximate Cause

Defendant also contends that the State failed to show that there was no intervening cause of Matt’s death. Defendant argues that “the intervening cause and infliction of mortal wounds are the actions of Nate” because he split the Oxymorphone pill in half and handed half of it to Matt. It is well-established that:

“The act of the accused need not be the immediate cause of death. He is legally accountable if the direct cause is the natural result of the criminal act.” *State v. Minton*, 234 N.C. 716, 722, 68 S.E.2d 844, 848 (1952); *State v. Everett*, 194 N.C. 442, 140 S.E. 22 (1927). There may be more than one proximate cause and criminal responsibility arises when the act complained of caused or directly contributed to the death. *State v. Luther*, 285 N.C. 570,

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206 S.E.2d 238 (1974); *State v. Horner*, 248 N.C. 342, 103 S.E.2d 694 (1958).

*State v. Cummings*, 301 N.C. 374, 377-78, 271 S.E.2d 277, 279 (1980) (alteration omitted).

In the instant case, it is undisputed that defendant unlawfully sold Nate and Matt an Oxymorphone pill on 11 January 2008 for \$20.00. After Nate and Matt returned home from the movies, Nate split the pill in half and the two consumed the pill. Matt was pronounced dead the next morning. Matt's cause of death was an acute Oxymorphone overdose. In the light most favorable to the State, the evidence was sufficient to submit to the jury the question of whether the act of defendant selling Nate and Matt the Oxymorphone pill was a proximate cause of Matt's death. *See id.* at 378, 271 S.E.2d at 279-80; *State v. Bailey*, 184 N.C. App. 746, 749, 646 S.E.2d 837, 839 (2007) ("[T]he question of whether defendant's conduct was the proximate cause of death is a question for the jury." (citation omitted)).

iii. "Ingestion"

Defendant contends that the State failed to prove that Matt "ingested" the Oxymorphone pill as required by N.C. Gen. Stat. § 14-17 because there was no evidence presented as to how Matt consumed his half of the pill. Defendant argues that to "ingest" the pill, Matt had to have taken it by mouth and swallowed it. By making such an argument, defense counsel ignores the well-established principle that, "where possible, the language of a statute will be interpreted so as to avoid an absurd consequence." *State v. Spencer*, 276 N.C. 535, 547, 173 S.E.2d 765, 773 (1970) (quotation omitted). At trial, toxicology reports showed that lethal amounts of Oxymorphone were present in Matt's blood and a physician opined that the cause of death was an acute Oxymorphone overdose. Plenary evidence at trial showed that Matt ingested half of the Oxymorphone pill.

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder. Each of these arguments is without merit.

III. Double Jeopardy

[2] In his second argument, defendant contends that he received multiple punishments for the same act in violation of the Double Jeopardy Clauses of the United States and North Carolina Constitutions. We disagree.

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At the sentencing hearing, the State specifically addressed the question of whether the trial court was permitted to impose consecutive sentences in this case. Defense counsel raised no objection based upon double jeopardy at that time or when the trial court actually imposed the sentences. It is well settled that “constitutional error will not be considered for the first time on appeal.” *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005) (citations omitted); *see also State v. Madric*, 328 N.C. 223, 231, 400 S.E.2d 31, 36 (1991) (holding that the defendant had waived the double jeopardy issue where the defendant failed to raise it at trial). Thus, defendant has waived appellate review of this issue.

Even assuming *arguendo* that counsel had properly preserved this issue for appeal, his contentions are without merit. The Double Jeopardy Clause of the United States and North Carolina Constitutions protects a defendant against multiple punishments for the same offense. *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). Our Supreme Court has stated that “where a legislature clearly expresses its intent to proscribe and punish exactly the same conduct under two separate statutes, a trial court in a single trial may impose cumulative punishments under the statutes.” *Id.* at 453, 340 S.E.2d at 708 (quotation and emphasis omitted). We first note that the North Carolina General Assembly made the offenses that defendant was convicted of separate and distinct under our General Statutes, each enumerated in different chapters and subsections. *See N.C. Gen. Stat. §§ 14-17, 90-95(a)(1), 90-95(e)(5).*

“Where . . . a single criminal transaction constitutes a violation of more than one criminal statute, the test to determine if the elements of the offenses are the same is whether each statute requires proof of a fact which the others do not.” *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987) (citations omitted). However, one offense is a lesser included offense if all the essential elements of the lesser offense are also essential elements of the greater offense, and the two crimes are considered identical for double jeopardy purposes. *Id.* The elements of second-degree murder in this case pursuant to N.C. Gen. Stat. § 14-17 are: (1) the unlawful distribution of a controlled substance under N.C. Gen. Stat. § 90-90(1)d; (2) ingestion of the controlled substance by an individual; and (3) the controlled substance proximately caused the death of the user. The elements of sale or delivery of a controlled substance to a juvenile pursuant to N.C. Gen. Stat. § 90-95(e)(5) are: (1) the defendant was 18 years old or over; (2) defendant sold or delivered a controlled substance; and

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(3) to a person under the age of 16 and older than 13 years old. Each of these offenses includes an essential element not present in the other. Second-degree murder and sale or delivery of a controlled substance to a juvenile are not identical offenses for purposes of double jeopardy.

Defendant also pled guilty to possession with intent to sell or deliver a Schedule II controlled substance. Defendant failed to assert that this conviction and the murder conviction constituted double jeopardy. Further, it is well settled that “possession of a controlled substance and distribution of the same controlled substance are separate and distinct crimes, and each may be punished as provided by law, even where the possession and distribution in point of time were the same.” *State v. Brown*, 20 N.C. App. 71, 72, 200 S.E.2d 666, 667 (1973) (citations omitted), *cert. denied*, 284 N.C. 617, 202 S.E.2d 274 (1974).

This argument is without merit.

**IV. Irrelevant Testimonial Evidence**

[3] In his third argument, defendant contends that the trial court erred by admitting evidence regarding the manner in which defendant’s mother obtained Oxymorphone pills. We disagree.

At trial, the State introduced evidence tending to show that defendant obtained the Oxymorphone pills from his mother, who had two prescriptions for the drug. The challenged testimony dealt with the attempts by defendant’s mother to refill the prescriptions early. Defendant argues that this evidence was completely irrelevant to this case. However, defendant fails to articulate how this evidence prejudiced his trial. See *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987) (“The burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission. The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded.” (internal citations omitted)). Defendant has failed to meet his burden of showing prejudice. N.C. Gen. Stat. § 15A-1443(a) (2009).

This argument is without merit.

NO ERROR.

Judges BRYANT and ERVIN concur.

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[209 N.C. App. 152 (2011)]

LATRECIA TREADWAY, PLAINTIFF V. SUSANNA KRAMMER DIEZ, GENE LUMMUS, GENE LUMMUS HARLEY DAVIDSON, INC., MIKE CALLOWAY, INDIVIDUALLY AND OFFICIALLY, JOHN DOE, INDIVIDUALLY AND OFFICIALLY, COUNTY OF BUNCOMBE, BUNCOMBE COUNTY SHERIFF'S DEPARTMENT, DEFENDANTS

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HULIN K. TREADWAY, PLAINTIFF V. SUSANNA KRAMMER DIEZ, GENE LUMMUS, GENE LUMMUS HARLEY DAVIDSON, INC., MIKE CALLOWAY, INDIVIDUALLY AND OFFICIALLY, JOHN DOE, INDIVIDUALLY AND OFFICIALLY, COUNTY OF BUNCOMBE, BUNCOMBE COUNTY SHERIFF'S DEPARTMENT, DEFENDANTS

No. COA10-99, 10-100

(Filed 4 January 2011)

**Parties— motion to amend—substitution of a misnomer—correction to name of party served**

The trial court did not abuse its discretion by allowing plaintiffs' motion to amend to substitute "Van Duncan, Sheriff of Buncombe County" for "Buncombe County Sheriff's Department," or by denying defendant's motions to dismiss even though plaintiffs contended that defendant Sheriff's Department was not a legal entity subject to suit. Substitution in the case of a misnomer was not considered substitution of new parties, but a correction in the description of the party actually served. The various summonses were all served on the appropriate party, and defendant sheriff had notice that he was the target of a lawsuit dating back to the original claim.

Judge JACKSON dissenting in opinion prior to 31 December 2010.

Appeal by defendant Buncombe County Sheriff's Department from orders entered 8 October 2009 by Judge Bradley B. Letts in Buncombe County Superior Court. Heard in the Court of Appeals 16 September 2010.

*Hyler & Lopez, P.A., by Robert J. Lopez, for plaintiff.*

*Doughton & Hart PLLC, by Thomas J. Doughton and Amy L. Rich, for defendant.*

ELMORE, Judge.

On 3 December 2005, Latrecia Treadway and Hulin Keith Treadway (plaintiffs) were injured in a motor vehicle accident<sup>1</sup>

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1. Plaintiffs initiated separate lawsuits against defendants for their injuries resulting from the accident; plaintiff Hulin Keith Treadway was the driver of the

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during the Smoky Mountain Toy Run, an event that gathered toys and monetary donations for the Salvation Army and that involved a parade of motorcycles. Per their complaints, plaintiffs were on a motorcycle in the parade when Susanna Krammer Diez<sup>2</sup> pulled out in front of them in her car. The accident occurred at an intersection which, plaintiffs allege, two deputy sheriffs in the employ of Buncombe County Sheriff's Department (defendant Sheriff's Department) had been monitoring until just before the accident.

Plaintiffs filed their complaints on 2 December 2008, naming as a defendant, among others, "Buncombe County Sheriff's Department." Their amended complaints, filed 2 January 2009, said the same. A summons was issued in each case on 3 December 2008, and then an alias and pluries summons on 12 February 2009, after the amended complaints were filed. On 17 March 2009, plaintiffs mailed copies of the summonses, the alias and pluries summonses, the complaints, and the amended complaints to "Van Duncan, Sheriff of Buncombe County[.]"

On 13 April 2009, defendant Sheriff's Department filed an answer. On 12 May 2009 and 7 August 2009, plaintiffs caused further alias and pluries summonses to be issued; as with the previous summonses, the defendant each identified was Buncombe County Sheriff Department "c/o VAN DUNCAN SHERIFF[.]". On 8 September 2009, defendant Sheriff's Department filed a motion to dismiss on the basis that "Buncombe County Sheriff's Department is not a legal entity subject to suit[.]" On 22 September 2009, plaintiffs filed motions to amend/substitute asking to substitute "Van Duncan, Sheriff of Buncombe County[.]" for "Buncombe County Sheriff's Department." A hearing on all motions was conducted on 29 September 2009; the motion was granted on 2 October 2009.

Defendant Sheriff's Department asks that this Court reverse the trial court's denial of its motions to dismiss and grant of plaintiffs' motions to amend. The basis of its argument regarding its motion to dismiss is that defendant Sheriff's Department is "not a legal entity subject to suit"—a question that is resolved by the grant of plaintiffs' motions to amend. As such, we need consider here only whether the motion to amend was properly granted.

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motorcycle, while plaintiff Latrecia Treadway was his passenger. Their briefs to this Court are virtually identical aside from their names, as are the briefs of defendant Buncombe County Sheriff's Department. As such, we consider both together here.

2. Ms. Diez was a party to the original action but not to this appeal.

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“ ‘A motion to amend is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse.’ ” *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 486, 593 S.E.2d 595, 601 (2004) (quoting *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)). Rule 15(c) of the North Carolina Rules of Civil Procedure, which governs the relation back of amendments, states:

A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (2009). The long-established general interpretation of this Rule, set out in *Crossman v. Moore*, is:

We believe the resolution of this case may be had by discerning the plain meaning of the language of the rule. Nowhere in the rule is there a mention of parties. It speaks of claims and allows the relation back of claims *if the original claim gives notice of the transactions or occurrences to be proved pursuant to the amended pleading*. When the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur. As a matter of course, *the original claim cannot give notice of the transactions or occurrences to be proved in the amended pleading to a defendant who is not aware of his status as such when the original claim is filed*. We hold that this rule does not apply to naming of a new party-defendant to the action. It is not authority for the relation back of a claim against a new party.

341 N.C. 185, 187, 459 S.E.2d 715, 717 (1995) (emphases added). As our Supreme Court noted in *Electric Membership Corp. v. Grannis Brothers*, “[s]ubstitution in the case of a misnomer, is not considered substitution of new parties, but a correction in the description of the party or parties actually served.” 231 N.C. 716, 720, 58 S.E.2d 748, 751 (1950).

Whether actual service upon, and the corresponding notice of the claim to, the correct party or entity was made is the key point on which our decisions in this area have turned. See, e.g., *Langley v. Baughman*, 195 N.C. App. 123, 126, 670 S.E.2d 913, 915 (2009) (“[The] defendant received notice of the original claim despite the error in

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his name. The summons listed his correct address and was delivered to him.”).

When the misnomer or misdescription does not leave in doubt the identity of the party intended to be sued, or even where there is room for doubt as to identity, if service of process is made on the party intended to be sued, the misnomer or misdescription may be corrected by amendment at any stage of the suit.

*Franklin v. Winn Dixie Raleigh, Inc.*, 117 N.C. App. 28, 34, 450 S.E.2d 24, 28 (1994) (quotations and citation omitted); *see also Tyson v. Leggs Products, Inc.*, 84 N.C. App. 1, 8, 351 S.E.2d 834, 838 (1987) (applying this rule and concluding that, “since the plaintiffs have sued and served the appropriate party, their delay in substituting the correct name of that party is not fatal”).

Here, the various summonses were all served on Van Duncan, who was the sheriff, and thus the appropriate defendant for the suit, and who was himself later substituted in place of defendant Sheriff’s Department as a defendant. As such, he did have notice that he was the target of a lawsuit dating back to the original claim.

Defendant alleges that this is not the key point in an argument that relies heavily on *Wicker v. Holland*, 128 N.C. App. 524, 526-27, 495 S.E.2d 398, 400 (1998). There, the plaintiff named a landowner and the tenant on her land as defendants when a contractor they hired to improve the land damaged her property. *Id.* at 526, 495 S.E.2d at 399-400. The defendants filed answers, and then the defendant landowner filed a third-party complaint against the contractor, while the defendant tenant filed a cross-claim against the contractor. *Id.* The contractor became a third-party defendant; the other two defendants then filed for summary judgment. *Id.* At that point—outside the statute of limitations—the plaintiff moved to amend her complaint to make the contractor a named defendant in the action, arguing that the amendment related back per Rule 15(c) because the contractor had notice of the claims against him due to his role as a third-party defendant. *Id.* The trial court denied the motion to amend, and this Court affirmed. *Id.* at 528, 495 S.E.2d at 401.

This case is distinguishable from the case at hand in two important ways. First, the plaintiff in *Wicker* was most certainly attempting to add a new party; even though the contractor was at that point named as a third-party participant in the litigation, granting the plaintiff’s motion would have *added* a defendant—that is, it would have meant that there were suddenly four defendants where there had

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originally been three—rather than simply renaming the same defendant. *See id.* at 527, 495 S.E.2d at 400 (“Wicker sought to add a party, and such action is not authorized by the rule.”). And, second, on appeal to this Court, the plaintiff made no misnomer argument similar to the ones made in the case at hand—that is, the plaintiff at no point alleged that the correct party called by the wrong name had been served, but rather asked that an existing, properly named entity be reclassified to become a defendant.

As such, we hold that the trial court did not err in allowing plaintiffs’ motions to amend, nor in denying defendant’s motions to dismiss.

Affirmed.

Judge STEPHENS concurs.

Judge JACKSON dissents prior to 31 December 2010 by separate opinion.

JACKSON, Judge, dissenting.

Because I believe the trial court erred in denying defendant Sheriff’s Department’s motions to dismiss and allowing plaintiffs’ motions to amend, I respectfully dissent.

In the cases *sub judice*, plaintiffs’ respective complaints and amended complaints named as a party-defendant, “Buncombe County Sheriff’s Department.” A series of summonses and alias and pluries summonses each named “Buncombe County Sheriff’s Department” as a party-defendant. The Sheriff’s Department moved to dismiss because “Buncombe County Sheriff’s Department is not a legal entity subject to suit[.]” Pursuant to North Carolina Rules of Civil Procedure, Rule 15(c), plaintiffs then moved to “amend/substitute” “Van Duncan, Sheriff of Buncombe County[,]” for “Buncombe County Sheriff’s Department.” On 2 October 2009, after the applicable statute of limitations had expired, the trial court granted plaintiffs’ motions and denied defendant Sheriff’s Department’s motions.

Contrary to the majority’s opinion, I do not think the substitution at issue constitutes a simple correction of a misnomer. Rather, plaintiffs sought to substitute a new party-defendant, Van Duncan, Buncombe County Sheriff—a natural person over whom the court could obtain jurisdiction—for the Sheriff’s Department, over which the court could not obtain jurisdiction. *See* N.C. Gen. Stat.

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§ 1A-1, Rule 4(j) (2009) (providing methods for service of process upon natural persons and certain legal entities). *See also* N.C. Gen. Stat. § 162-16 (2009) (setting forth requirements of service of process when a sheriff is a party). This is clear because, North Carolina General Statutes, section 162-1 establishes the office of the sheriff. N.C. Gen. Stat. § 162-1 (2009). In contrast, no provision is made for the establishment of a “Sheriff’s Department” as a distinct legal entity with the capacity to be sued. Instead, section 162-24 provides that “[t]he sheriff may not delegate to another person the final responsibility for discharging his official duties, but he may appoint a deputy or employ others to assist him in performing his official duties.” N.C. Gen. Stat. § 162-24 (2009).

Although the Sheriff received actual notice of plaintiffs’ lawsuits in the cases *sub judice*, our Supreme Court has held that such notice is immaterial with respect to the operation of amendments to pleadings pursuant to Rule 15(c). *See Crossman v. Moore*, 341 N.C. 185, 187, 459 S.E.2d 715, 717 (1995) (explaining that Rule 15(c) “speaks of claims and allows the relation back of claims if the original claim gives notice of the transactions or occurrences to be proved pursuant to the amended pleading[]” and qualifying that, “[w]hen the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur”) (emphasis added). Here, plaintiffs clearly contemplated substituting the Sheriff for the Sheriff’s Department as the appropriate party-defendant by denominating the motions as motions to “amend/substitute.” Rule 15(c) provides for the amendment of claims, and new *parties* cannot be added or substituted under the guise of an amended *claim*. *See id.* Furthermore, I am concerned that the precedent hereby established may erode, through the power of the judiciary, the legislatively effected Rule 4 of the North Carolina Rules of Civil Procedure.

Finally, I have not found, nor have counsel cited, a North Carolina case in which a Sheriff’s Department rather than the Sheriff was sued. To the contrary, each case supports the proposition that the Sheriff is the proper party to be sued. *See, e.g., Pay Tel Communications, Inc. v. Caldwell County*, \_\_\_ N.C. App. \_\_\_, 692 S.E.2d 885 (2011) (naming “Sheriff of Caldwell County” as a party-defendant); *Boyd v. Robeson County*, 169 N.C. App. 460, 621 S.E.2d 1 (naming “Glenn Maynor, Sheriff of Robeson County, in his official and individual capacities” as a party-defendant), *disc. rev. denied*, 359 N.C. 629, 615 S.E.2d 866 (2005); *Summey v. Barker*, 142 N.C. App. 688, 544 S.E.2d 262 (2001) (naming “Ronald Barker, Forsyth County Sheriff” as a party-

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defendant), *aff'd as modified*, 357 N.C. 492, 586 S.E.2d 247 (2003); *Clark v. Burke County*, 117 N.C. App. 85, 450 S.E.2d 747 (1994) (naming “Ralph E. Johnson, In His Capacity As Burke County Sheriff” as a party-defendant).<sup>3</sup>

Accordingly, I would reverse the trial court’s orders.

Judge Jackson dissents by separate opinion prior to December 31, 2010.



STATE OF NORTH CAROLINA v. TRAVIS LEVANCE WALTERS, DEFENDANT

No. COA10-281

(Filed 4 January 2011)

**1. Evidence—admission of prior unsworn statement—corroborative—probative value not substantially outweighed by prejudice**

The trial court did not err in a first-degree murder trial by admitting into evidence the prior unsworn statement of the deceased victim’s sister where the statement was being used to corroborate the testimony of the witness who originally made the statement. Furthermore, defendant failed to show that the probative value of the statement was substantially outweighed by the risk of unfair prejudice.

**2. Jury—jury instructions—continue deliberations—pattern jury instruction—language of statute—no abuse of discretion**

The trial court did not abuse its discretion by instructing the jury to continue its deliberations using North Carolina Pattern Jury Instruction 101.40 rather than the language of N.C.G.S. § 15A-1235. Defendant failed to show a discrepancy between the substance of the pattern instruction and N.C.G.S. § 15A-1235.

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3. Although *Mabee v. Onslow County Sheriff's Dep't*, 174 N.C. App. 210, 620 S.E.2d 307 (2005), *disc. rev. denied*, 360 N.C. 364, 629 S.E.2d 854 (2006), names a Sheriff’s Department in the case’s caption, Ed Brown—the Onslow County Sheriff—also was named as a party-defendant. *Id.* However, the issue in the case *sub judice* was not addressed in *Mabee*, which concerned the failure of the plaintiff to serve the Sheriff properly pursuant to North Carolina General Statutes, section 162-16. *Id.* at 211, 620 S.E.2d at 308.

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Appeal by defendant from judgment entered 25 September 2009 by Judge Robert F. Floyd, Jr., in Robeson County Superior Court. Heard in the Court of Appeals 16 September 2010.

*Attorney General Roy Cooper, by Special Deputy Attorney General Buren R. Shields, III, for the State.*

*M. Alexander Charns for defendant.*

ELMORE, Judge.

Defendant was convicted of first degree murder based upon the felony murder doctrine, as well as the underlying felony, robbery with a dangerous weapon; he was sentenced to life imprisonment without parole. Defendant raises two assignments of error on appeal: (1) the trial court erred by admitting into evidence the prior unsworn testimony of Latashia Waters, and (2) the trial court erred by instructing the jury using North Carolina Pattern Jury Instruction 101.40 rather than the language of N.C.G.S. § 15A-1235.

*Facts*

On 6 January 1998, defendant shot Betty Oxendine during his robbery of the Hardee's restaurant at which she worked; she later died of the wound she sustained. Investigating officers interviewed defendant's sister Latashia Waters and his mother before interviewing defendant. When they did interview defendant, he admitted shooting the victim, but stated that the gun just "went off" during the robbery.

Defendant was arrested for first degree murder on 6 January 1998. During the trial, Ms. Waters was called as a witness for the State. On direct examination, Ms. Waters was asked if she remembered speaking with an officer shortly after the killing occurred, and she responded that she did not remember. The prosecutor then showed Ms. Waters a statement that she had given to Lieutenant Barnes and asked her to identify it. She identified the document as her statement. The prosecutor then moved to introduce the statement into evidence; the defendant's attorney objected, and the trial court sustained the objection. Even after reading the statement, Ms. Waters stated that she did not remember what she told the officer; the prosecutor then asked her to read it again to see if it would refresh her memory. After reading the statement a second time, Ms. Waters answered that reading the statement had refreshed her recollection.

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The prosecutor proceeded to ask Ms. Waters questions about her interactions with her brother the night of the murder. Ms. Waters testified that her brother had said that he shot the girl at Hardee's "[b]ecause him and his girlfriend was fussing," and that "[h]e was going to take it out on somebody." The prosecutor then moved a second time for the statement to be introduced into evidence, but the trial court again sustained defendant's objection. After asking further questions regarding the events of the night of the murder, the prosecutor again moved to introduce the statement into evidence; this time, the trial court granted the motion and received it into evidence. Immediately after the statement was admitted, defendant requested a limiting instruction that the evidence was only being offered and received for the purpose of corroborating the testimony of the witness; the trial court granted that request.

After the close of arguments, the jury began deliberations, which eventually spanned three days. After a series of requests by the jury, the trial court repeated the charges, the elements of each, and the verdict options for each.

On the second day of deliberations, the jury informed the judge that there was an eleven to one deadlock regarding the first degree murder charge but not on the charge of robbery with a dangerous weapon. The judge sent the jury back to the jury room and directed them to continue deliberations on both charges and to report back if they could not reach a unanimous verdict. He then stated:

I remind you that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women in an effort to reconcile your differences, if you can, without surrender of conscientious convictions, but no juror should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict.

Before the jury entered the courtroom, defendant objected to some of the language to be used in this instruction and requested that the court re-instruct the jury by reading instead from the applicable statute. The court stated: "Your objection is noted[,]" but denied the request. The next day the jury returned with a unanimous verdict of guilty on the first degree murder charge, under the felony murder rule, as well as the underlying felony, robbery with a dangerous weapon.

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*Discussion*

Defendant appeals both the admission of Ms. Waters's statement and the failure of the trial court to instruct the jury using the language of N.C. Gen. Stat. § 15A-1235, and instead instructing the jury using North Carolina Pattern Jury Instruction 101.40.

## I.

[1] Defendant first argues that the trial court erred by admitting the unsworn out-of-court statement Ms. Waters made to the police. Defendant asserts that the trial court was in error based on two grounds: (1) under North Carolina Rule of Evidence 607, it was improper for the trial court to admit the substance of Ms. Waters's previous statement; and (2) even if this Court finds that it was not error for the trial court to admit the statement under Rule 607, the trial court should have excluded the statement under Rule of Evidence 403.

*North Carolina Rule of Evidence 607*

Rule 607 explicitly states that the "credibility of a witness may be attacked by any party, including the party calling him." N.C. Gen. Stat. § 8C-1, Rule 607 (2009). In *State v. Hunt*, our Supreme Court held that impeachment by prior inconsistent statement may not be allowed when used merely for the purposes of placing evidence that would not otherwise be admissible before the jury. 324 N.C. 343, 349, 378 S.E.2d 754, 757 (1989). Prior statements of a witness may be admitted as corroborative evidence "if they tend to add weight or credibility to the witness' trial testimony." *State v. Williams*, 363 N.C. 689, 704, 686 S.E.2d 493, 503 (2009) (quotations and citation omitted).

Based on *Hunt*, defendant argues that it was error for the trial court to admit Ms. Waters's statements into evidence for corroboration or for impeachment. There are, however, several differences between the facts of the case at bar and the facts of *Hunt* that lead us to conclude that it was proper for the trial court to allow the substance of Ms. Water's previous statement into evidence.

First, the witness in *Hunt* was deemed to be a hostile or unwilling witness and had expressly denied the substance of her prior statements. *Hunt*, 324 N.C. at 345-46, 378 S.E.2d at 756. Conversely, although Ms. Waters testified that she did not remember speaking with the police on the night of the murder, she did not ever deny making the statement to the police, nor did the trial court make a

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determination that Ms. Waters was a hostile or unwilling witness. Second, in *Hunt*, the previous out-of-court statement was being offered into evidence through a police officer who was testifying as to the substance of that statement, and the statement was to be used to corroborate the officer's testimony. *Id.* at 347, 378 S.E.2d at 756. In this case, the State was offering the substance of Ms. Waters's statement to corroborate *her* in-court testimony. Finally, in *Hunt*, the prior statement was entered into evidence without a limiting instruction, and the judge did not inform the jury that they must not consider the prior statement as evidence of the truth until his final charge. *Id.* at 351-52, 378 S.E.2d at 759. In this case, however, the trial court issued a limiting instruction when the evidence was admitted, and the statement was immediately published to the jury. In combination, these facts serve to distinguish the facts of this case from the facts in *Hunt*.

In *Hunt*, the Supreme Court was concerned with keeping impeachment or corroboration from being used improperly by the State to admit evidence that would otherwise be inadmissible. *Id.* at 349, 378 S.E.2d at 757. This concern stems from the likely confusion of a jury in distinguishing between the impeachment, corroborative, and substantive uses of evidence. *Id.* at 349, 378 S.E.2d at 757-58. The concerns raised in *Hunt* are not present in the case at hand, however; here, a limiting instruction was given *in conjunction with* the admission of her statement, just before the statement was published to the jury. This limiting instruction served to limit the risk of confusion where the final charge by the trial judge in *Hunt* did not.

Here, because the statement was being used to corroborate the testimony of the witness who originally made the statement, there is no improper use as in *Hunt*. Therefore, it was not error for the trial court to admit the statement.

Finally, we note that defendant argues that admission of the statement violated the Confrontation Clause and *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), inasmuch as it was a testimonial hearsay statement which the State knew the witness could not remember making. As Ms. Waters was present to testify and be cross-examined at trial, however, this argument is unavailing.

*North Carolina Rule of Evidence 403*

In the alternative, defendant argues that, even if this Court finds that the statement was admissible under Rule 607, it should have been excluded under Rule 403, because the probative value of the

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evidence was substantially outweighed by the danger of unfair prejudice. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2009). We disagree.

Rule 403 states that, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .” *Id.* Whether to exclude evidence pursuant to the Rule

is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion. A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.

*State v. Campbell*, 359 N.C. 644, 674, 617 S.E.2d 1, 20 (2005) (quotations and citations omitted).

In this case, defendant offers no evidence suggesting that the trial court abused its discretion. Instead, defendant points to a single quote from the statement of Ms. Waters, taken out of context, and declares that the statement is extremely prejudicial. In response to questions from the police regarding why her brother had killed the victim, Ms. Waters answered that it was “[b]ecause him and his girl-friend was fussing,” and that “[h]e was going to take it out on somebody.” While this statement may be prejudicial to defendant’s case, mere prejudice is not the determining factor in the Rule 403 balancing test. Rather, the trial judge must determine whether the *unfair* prejudice *substantially* outweighs the probative value. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2009). Defendant has failed to present evidence which shows that the probative value of Ms. Waters’s statement was substantially outweighed by the risk of unfair prejudice.

In sum, we hold that the trial judge did not abuse his discretion in admitting Ms. Waters’s statement.

## II.

**[2]** Defendant’s second argument centers on the decision of the trial court to instruct the jury based on North Carolina Pattern Jury Instruction 101.40 (pattern instruction), rather than N.C. Gen. Stat. § 15A-1235.

“A trial court is not required to give a requested instruction in the exact language of the request, but where the request is correct in law and supported by the evidence in the case, the court must give the instruction in substance.” *State v. Summey*, 109 N.C. App. 518, 526, 428 S.E.2d 245, 249 (1993) (citation omitted).

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The language of N.C. Gen. Stat. § 15A-1235(b) states:

Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:

- (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
- (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
- (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
- (4) No juror should weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

N.C. Gen. Stat. § 15A-1235(b) (2009) (emphasis added).

The pattern instruction states:

Your foreman informs me that you have so far been unable to agree upon a verdict. The Court wants to emphasize the fact that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women and to reconcile your differences, if you can, without the surrender of conscientious convictions. But no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict. I will let you resume your deliberations and see if you can reach a verdict.

N.C.P.I. Crim. 101.40 (2004). Finally, as stated above, the trial court's instructions to the jury were:

I remind you that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women in an effort to reconcile your differences, if you can, without surrender of conscientious convictions, but no juror should surrender an honest conviction as

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to the weight or effect of the evidence solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict.

As is clear from a cursory reading of the three, they are virtually identical. Defendant argues that the slight rewording by the trial court makes it into a misstatement of the jury's duty as being to simply reach any verdict, rather than a truthful verdict. *See, e.g., State v. Lamb*, 44 N.C. App. 251, 252, 261 S.E.2d 130, 131 (1979).

When reviewing a trial court's decision to instruct a jury using a pattern instruction rather than a direct reading of a statute, the question is whether the instruction as given by the trial court "force[d] a verdict or merely serve[d] as a catalyst for further deliberations[.]" *State v. Peek*, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (1985). Defendant points to no evidence to show that the instruction was anything more than a catalyst for further deliberation besides one question from the jury: "Judge, there appears to be a total difference of interpretation of the second degree verdict option." However, defendant provides no explanation as to how that statement shows that the trial court's instruction was in error or caused the jury to misunderstand its role.

Because defendant has not shown evidence which indicates a discrepancy between the substance of the pattern instruction and N.C. Gen. Stat. § 15A-1235, it was not an abuse of discretion for the trial court to instruct the jury using the pattern instruction. *See State v. Borders*, 164 N.C. App. 120, 123, 594 S.E.2d 813, 815-16 (2004) (holding no error where the instruction given to the jury was "virtually identical" to the pattern instruction and thus gave the substance of the requested instruction).

*Conclusion*

For the reasons stated above, we hold that it was not error for the trial court to admit Ms. Waters's statement, nor for it to instruct the jury based on North Carolina Pattern Jury Instruction 101.40, rather than reading N.C. Gen. Stat. § 15A-1235 directly to the jury.

No error.

Judges JACKSON and STEPHENS concur.

Judge JACKSON concurred in this opinion prior to 31 December 2010.

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[209 N.C. App. 166 (2011)]

FRED SHERRICK AND SHEILA SHERRICK, PLAINTIFFS v. WILLIAM J.  
SHERRICK AND SARAH L. SHERRICK, DEFENDANTS

No. COA10-230

(Filed 4 January 2011)

**Jurisdiction— subject matter—juvenile court versus civil court—child neglect—child custody—attorney fees—Chapter 7B juvenile proceeding—Chapter 50 civil action**

The trial court lacked subject matter jurisdiction to enter its 7 August 2009 and 23 October 2009 orders regarding child custody and attorney fees in a Chapter 50 civil action between private parties. The orders were vacated and remanded to the district court based on a failure to comply with N.C.G.S. § 7B-911 in terminating the jurisdiction of the juvenile court obtained from the initial juvenile neglect proceeding. Upon remand, the case remained within the jurisdiction of the juvenile court unless and until the juvenile court terminated its jurisdiction in compliance with N.C.G.S. § 7B-911 and entered a civil custody order in compliance with N.C.G.S. § 50-13.1, *et seq.*

Appeal by plaintiffs from orders entered 7 August 2009 and 23 October 2009 by Judge Addie M. Harris Rawls in District Court, Lee County. Heard in the Court of Appeals 31 August 2010.

*Wagner Law Firm, PC, by Lisa Anne Wagner, for plaintiff-appellants.*

STROUD, Judge.

Plaintiffs appeal a child custody order and an order awarding attorney fees. As we conclude the trial court did not have jurisdiction to enter these orders, we vacate both orders.

### I. Background

Defendants William Sherrick and Sarah Sherrick are the parents of Mary, a minor child.<sup>1</sup> On 9 November 2005 the Lee County Department of Social Services (“DSS”) filed a petition alleging that Mary was a neglected juvenile. Defendants herein, William Sherrick and Sarah Sherrick, were respondents in the neglect action; plaintiffs

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1. Mary is a pseudonym used to protect the identity of the minor child.

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herein were not parties to the case at that time.<sup>2</sup> On 6 December 2005, the trial court entered an order which adjudicated Mary as dependent based upon the defendants' drug use and domestic violence in the home. On 22 November 2006, the trial court entered a "REVIEW ORDER (ABUSE/NEGLECT/DEPENDENCY)" determining that the permanent plan for Mary would be custody with her paternal grandparents, Fred Sherrick and Sheila Sherrick, plaintiffs herein. The order also relieved "[t]he Department of Social Services, GAL and attorneys for the parents" of "any further responsibility[,] but specifically "retain[ed] jurisdiction for the entry of subsequent orders."

On 6 December 2007, defendants filed a motion to review the 22 November 2006 order. They alleged that they had both retained employment, found appropriate housing, and had submitted to drug testing; that the health of plaintiff, Fred Sherrick, had deteriorated, preventing his participation in Mary's care; and that Mary's emotional well-being had deteriorated. Based upon these allegations, defendants requested that the court "return [Mary] to the custody of her parents." On 14 January 2008, the trial court entered a "CONSENT ORDER" that specifically stated that "[t]his is a juvenile proceeding pursuant to the provisions of Sub-Chapter I of Chapter 7B of the General Statutes of North Carolina;" the trial court ordered that defendants receive visitation with Mary.

On 8 October 2008, the trial court entered another "CONSENT ORDER" which we will refer to as the "temporary custody order." The order states that "[t]his is a juvenile proceeding pursuant to the provisions of Sub-Chapter I of Chapter 7B of the General Statutes of North Carolina[.]" The 8 October 2008 order went on to state:

1. That the clerk shall treat this Consent Order as the initiation of a civil action for custody of the juvenile. The parties to said action shall be Fred, Sheila, Billy and Sarah and the caption of said action shall be "Fred Sherrick and Sheila Sherrick, Plaintiffs, versus William J. Sherrick and Sarah L. Sherrick, Defendants". The clerk shall waive the civil filing fee for said action.

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2. For ease of reference, we will refer to William Sherrick and Sarah Sherrick as defendants, although they were respondents until entry of the 7 August 2009 order. Likewise, we will refer to Fred Sherrick and Sheila Sherrick as plaintiffs, as they were not parties to the juvenile proceeding but were designated as "plaintiffs" by the 8 October 2008 order.

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The 8 October 2008 order further provided that all parties would have “temporary joint legal custody” of Mary.

On 7 August 2009, the trial court entered a custody order after holding a hearing upon defendants’ 6 December 2007 motion for review of the 22 November 2006 review order. The trial court’s 7 August 2009 order was entered under the civil action caption and ultimately ordered, *inter alia*, that “[t]he defendants shall have sole legal and physical custody of the minor child.” On 15 September 2009, plaintiffs filed their notice of appeal from the 7 August 2009 custody order.<sup>3</sup> On 22 September 2009, defendants filed a motion for attorney’s fees. On 23 October 2009, the trial court ordered plaintiffs to pay defendants’ attorneys’ fees. Plaintiffs filed notice of appeal from the 23 October 2009 order on 25 November 2009.

## II. Jurisdiction

Although plaintiffs have not raised the issue of the trial court’s subject matter jurisdiction under Chapter 50 to enter either of the orders which are the subject of this appeal, it is necessary for us to address this issue first. *See State v. Jernigan*, 255 N.C. 732, 736, 122 S.E.2d 711, 714 (1961) (“Where a lack of jurisdiction appears upon the face of the record, as it does here, this Court, even in the absence of a motion, will *ex mero motu* vacate and set aside the proceedings done when there is no jurisdiction.”)

Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal. The determination of subject matter jurisdiction is a question of law and this Court has the power to inquire into, and determine, whether it has jurisdiction and to dismiss an action . . . when subject matter jurisdiction is lacking.

*In re S.T.P.*, — N.C. App. —, —, 689 S.E.2d 223, 226 (2011) (citations and quotations marks omitted). The trial court initially exercised jurisdiction in this matter in a juvenile neglect proceeding pursuant to N.C. Gen. Stat. § 7B-200(a). By statute the district courts of this State are conferred “exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent.” N.C. Gen. Stat. § 7B-200(a) (2007). “When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is

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3. Plaintiffs’ notice of appeal was timely as they were not served with the 7 August 2009 order until 18 August 2009. N.C.R. App. P. Rule 3(c)(2).

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otherwise emancipated, whichever occurs first.” N.C. Gen. Stat. § 7B-201(a) (2007).

Both of the orders from which plaintiffs appeal were entered after the purported transfer of this case from the jurisdiction of the juvenile court, as an abuse/neglect/dependency proceeding under Chapter 7B, to a civil action between private parties under Chapter 50. Although both juvenile proceedings and custody proceedings under Chapter 50 are before the District Court division, jurisdiction is conferred and exercised under separate statutes for the two types of actions. For that reason, we will refer to the District Court in this opinion as either the “juvenile court” or the “civil court” to avoid confusion. The “juvenile court” is the District Court exercising its exclusive, original jurisdiction in a matter pursuant to N.C. Gen. Stat. § 7B-200(a); the “civil court” is the District Court exercising its child custody jurisdiction pursuant to N.C. Gen. Stat. § 50-13.1, *et seq.* In many judicial districts, we recognize that both juvenile matters and Chapter 50 civil custody matters may be heard in the same courtroom and by the same District Court Judge. However, there is a clear dividing line between the exercise of the juvenile court’s jurisdiction and the civil court’s jurisdiction, and that line is drawn by N.C. Gen. Stat. § 7B-911.

N.C. Gen. Stat. § 7B-911 specifically provides the procedure for transferring a Chapter 7B juvenile proceeding to a Chapter 50 civil action. *See* N.C. Gen. Stat. § 7B-911 (2007). In certain cases which have originated as abuse, neglect, or dependency proceedings under Chapter 7B of the General Statutes, a time may come when involvement by the Department of Social Services is no longer needed and the case becomes a custody dispute between private parties which is properly handled pursuant to the provisions of Chapter 50. *See id.* N.C. Gen. Stat. § 7B-911 sets forth a detailed procedure for transfer of such cases which will ensure that the juvenile is protected and that the juvenile’s custodial situation is stable throughout this transition. For this reason, N.C. Gen. Stat. § 7B-911(b) requires that the juvenile court enter a permanent order prior to termination of its jurisdiction. After transfer, if a party desires modification of the juvenile’s custodial situation under Chapter 50, that party must file the appropriate motion for modification and demonstrate a substantial change in circumstances affecting the best interests of the child. N.C. Gen. Stat. § 50-13.7 (2007) (“[A]n order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party

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or anyone interested.”). *See also Savani v. Savani*, 102 N.C. App. 496, 505, 403 S.E.2d. 900, 906 (1992) (“[A] party is required to demonstrate substantially changed circumstances affecting the welfare of the child in order to be granted a modification of an existing custody order.”) The procedure required by N.C. Gen. Stat. § 7B-911 is not a mere formality which can be dispensed with just because the parties agree to a consent order. Jurisdiction cannot be conferred upon the court by consent, but the trial court must exercise its jurisdiction only in accordance with the applicable statutes.

We first note that the 22 November 2006 review order which provided that “[t]he Department of Social Services, GAL and attorneys for the parents” were relieved of “any further responsibility[,]” may have “closed” the juvenile case at that time, for purposes of DSS’s active involvement, but it did not terminate the jurisdiction of the juvenile court. In fact, the order specifically provided that the juvenile court “retain[ed] jurisdiction for the entry of subsequent orders.” Our court has noted that “[c]losing” a case does not mean the same thing as “terminating jurisdiction.” *In re S.T.P.*, — N.C. App. at —, 689 S.E.2d at 227. “Each is a separate action with distinct consequences.” *Id.*

N.C. Gen. Stat. § 7B-911(c)(2) provides that the juvenile court may terminate its jurisdiction and transfer the matter to civil court if:

[i]n a separate order terminating the juvenile court’s jurisdiction in the juvenile proceeding, the court finds:

- a. That there is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding; and
- b. That at least six months have passed since the court made a determination that the juvenile’s placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.

N.C. Gen. Stat. § 7B-911(c)(2).

The 8 October 2008 order purporting to terminate juvenile court jurisdiction did not comply with N.C. Gen. Stat. § 7B-911(c)(2); actually, the order does not even state that the juvenile court is terminating its

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jurisdiction.<sup>4</sup> The trial court did not make any finding “[t]hat there is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding” and did not find any facts which would demonstrate why there would be no need for continued State intervention. There is also no finding “[t]hat at least six months have passed since the court made a determination that the juvenile’s placement with the person to whom the court is awarding custody is the permanent plan for the juvenile[.]” *See id.* We also note that it appears that the trial court could not have made a finding that “at least six months have passed since the court made a determination that the juvenile’s placement with the person to whom the court is awarding custody is the permanent plan for the juvenile,” because this was not true. The only order in the record before us setting forth a “permanent plan” for the juvenile was the 22 November 2006 review order, which granted permanent custody to the plaintiffs, but the 8 October 2008 order instead granted “temporary joint legal custody” to plaintiffs and defendants. Clearly, temporary joint custody granted to four people is not a “permanent plan” and this order was entered simultaneously with the purported transfer, not at least six months prior. A finding regarding the “permanent plan” was required, as the court did not award “custody to a parent or to a person with whom the child was living when the juvenile petition was filed,” *see id.*, as Mary was living with the defendants when the petition was filed, but the order granted “temporary, joint legal custody” to both plaintiffs and defendants. N.C. Gen. Stat. § 7B-911(c) explicitly provides that “[t]he court may enter a civil custody order under this section and terminate the court’s jurisdiction in the juvenile proceeding *only if* the court enters an order in compliance with N.C. Gen. Stat. § 7B-911(c)(2). (Emphasis added.) *See* N.C. Gen. Stat. § 7B-911(c). As the trial court’s 8 October 2008 temporary custody order did not comply with N.C. Gen. Stat. § 7B-911(c)(2), it did not terminate the juvenile court’s jurisdiction.<sup>5</sup> *See id.* The temporary custody order

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4. We also note that although it is proper for the court to enter a consent order in an abuse, neglect, or dependency proceeding, such an order may be entered only “when all parties are present, the juvenile is represented by counsel, and all other parties are either represented by counsel or have waived counsel, and sufficient findings of fact are made by the court.” N.C. Gen. Stat. § 7B-902. The 8 October 2008 order included no findings of fact beyond a procedural history of the case and the order provisions to which the parties were consenting.

5. We note that it appears that the trial court failed to comply with other requirements in N.C. Gen. Stat. § 7B-911; however, we need not address these issues as non-compliance with N.C. Gen. Stat. § 7B-911(c)(2) is enough to invalidate the purported transfer and as neither party has appealed from the erroneous 8 October 2008 order.

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purports to be a civil custody order under N.C. Gen. Stat. § 7B-911(c), but the juvenile court must first terminate jurisdiction before entering a civil custody order.<sup>6</sup> Although it is permissible for the court to enter one order which both terminates juvenile court jurisdiction and serves as the “civil custody order” under Chapter 50, instead of two separate orders, such an order still must include the proper findings of fact and conclusions of law required for each component of the order. *In re A.S. & S.S.*, 182 N.C. App. 139, 142, 641 S.E.2d 400, 402 (2007) (“The trial court may enter one order for placement in both the juvenile file and the civil file as long as the order is sufficient to support termination of juvenile court jurisdiction and modification of custody.”).

This Court has no jurisdiction to mandate any action in regard to the 8 October 2008 order, despite its defects as noted above. There has been no appeal from and no motion for relief from the 8 October 2008 order, and the juvenile court had jurisdiction to enter an order transferring the case, but the 8 October 2008 order 09-19 was not effective to terminate the juvenile court’s jurisdiction under N.C. Gen. Stat. § 7B-911, as noted above. However, we must vacate the 7 August 2009 and 23 October 2009 orders as the juvenile court never terminated its jurisdiction and the case was therefore never properly transferred from juvenile court to civil court; thus the trial court, acting under its Chapter 50 jurisdiction, had no subject matter jurisdiction to enter these orders.

### III. Conclusion

As the trial court failed to comply with N.C. Gen. Stat. § 7B-911 in terminating the jurisdiction of the juvenile court, we vacate the 7 August 2009 and 23 October 2009 orders and remand to the district court for further proceedings consistent with this opinion. We also note that upon remand, this case remains within the jurisdiction of the juvenile court unless and until the juvenile court terminates its jurisdiction in compliance with N.C. Gen. Stat. § 7B-911 and enters a civil custody order in compliance with N.C. Gen. Stat. § 50-13.1, *et seq.*

VACATE.

Judges HUNTER, Robert C. and HUNTER, JR., Robert N. concur.

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6. We note that in a civil custody order under N.C. Gen. Stat. § 7B-911(c), the court must make appropriate findings of fact and conclusions of law under N.C. Gen. Stat. § 50-13.1, *et seq.* The order does not contain any findings or conclusions as required by Chapter 50 for a custody order.

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CHARLES A. STANFORD; DONALD M. STANFORD, JR.; JAMES C. STANFORD; RANDOLPH L. STANFORD; CANDACE STANFORD ROBERTS; LESLEY STANFORD; AND ROBIN STANFORD MULKEY, PLAINTIFFS v. OLIVER JOHNSON PARIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES WHITSON STANFORD, JR. (90-E-255, ORANGE COUNTY); OLIVER JOHNSON PARIS, INDIVIDUALLY; AND JEAN S. MANN, AND SPOUSE, EDWARD N. MANN, JR., LEVEL I DEFENDANTS, STANFORD PLACE LIMITED PARTNERSHIP, A NORTH CAROLINA LIMITED PARTNERSHIP, (OLIVER JOHNSON PARIS, GENERAL PARTNER); OLIVER JOHNSON PARIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JANE S. PARIS (00-E-1010, MECKLENBURG COUNTY); JANE S. PARIS FAMILY TRUST (OLIVER JOHNSON PARIS, TRUSTEE); EDWARD N. MANN, III, AND SPOUSE, LINDSAY W. MANN; ORANGE WATER AND SEWER AUTHORITY; MARGARET M. PLESS; JENNIFER MANN HAWLEY, AND SPOUSE, LEON L. HAWLEY, JR.; AND CHARLES S. MANN, AND SPOUSE, LORI A. MANN, LEVEL II DEFENDANTS

No. COA09-19

(Filed 4 January 2011)

**1. Wills— personal property—stock—no ademption**

The trial court did not err by dismissing plaintiffs' complaint in a wills action because plaintiffs did not allege facts sufficient to establish that they had a legal right to testator's interest in the Redfields partnership. Testator's gift of his Redfields, Inc. stock remained in testator's estate *in specie* as personal property at the time of his death and, therefore, did not adeem upon the dissolution and termination of Redfields, Inc.

**2. Appeal and Error— preservation of issues—no legal argument—assignment of error abandoned**

Plaintiffs' argument that the trial court erred by omitting testator's checking account from the list of assets it determined should pass under the laws of intestacy was deemed abandoned where plaintiffs provided no legal argument in their brief in support of the assignment of error.

**3. Appeal and Error— claims not before trial court—appellate issues not addressed**

The trial court declined to address plaintiffs' remaining arguments in a wills case where the claims were neither alleged in plaintiffs' complaint nor considered nor determined by the trial court.

On remand from the North Carolina Supreme Court by Opinion filed 27 August 2010 with instructions to consider the merits of appeal by plaintiffs from judgment entered 18 July 2008 and from

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orders entered 16 February 2007, 20 February 2007, 15 November 2007, and 19 March 2008 by Judge Carl R. Fox in Orange County Superior Court.

*Donald M. Stanford, Jr., pro se, and for plaintiffs-appellants.*

*Horack, Talley, Pharr & Lowndes, P.A., by Zipporah Basile Edwards and Robert B. McNeill, for defendants-appellees Oliver Johnson Paris, Individually and as Personal Representative of the Estates of Charles Whitson Sanford, Jr. and Jane S. Paris, Stanford Place Limited Partnership (Oliver Johnson Paris, General Partner), and Jane S. Paris Family Trust (Oliver Johnson Paris, Trustee).*

*Pendergrass Law Firm, PLLC, by James K. Pendergrass, Jr., for defendants-appellees Edward N. Mann, III and spouse, Lindsay W. Mann.*

*Burns, Day & Presnell, P.A., by Lacy M. Presnell, III and James J. Mills, for defendants-appellees Jean S. Mann and spouse, Edward N. Mann, Jr., Jennifer Mann Hawley and spouse, Leon L. Hawley, Jr., and Charles S. Mann and spouse, Lori A. Mann.*

*Boxley, Bolton, Garber & Haywood, L.L.P., by Kenneth C. Haywood, and Horack, Talley, Pharr & Lowndes, P.A., by Robert B. McNeill and Zipporah Basile Edwards, for defendant-appellee Margaret M. Pless.*

*Epting & Hackney, by Robert Epting and Ellen B. Scouten, for defendant-appellee Orange Water and Sewer Authority.*

MARTIN, Chief Judge.

Our recitation of the facts is limited to those events deemed relevant to the issues before us on appeal. Details regarding the later procedural history of this appeal are recounted in *Stanford v. Paris*, 364 N.C. 306, 308-11, — S.E.2d —, — (2011). This action concerns the distribution of property from the estate of Charles Whitson Stanford, Jr. (“testator”), who died 19 May 1990, leaving a signed, holographic will dated 24 October 1970. In his will, testator, who never married and had no children, devised “[a]ll stocks, bonds, and real estate, savings account and E Bonds, wheresoever situate,” including “all stock in Redfields, Inc. left to [him] by [his] father” to his sisters, Jean Stanford Mann and Jane Stanford Paris. Plaintiffs are the children of testator’s brothers, Donald M. Stanford and William G. Stanford.

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Testator's brother, William Stanford, predeceased testator on 3 October 1987, and testator's brother, Donald Stanford, died on 5 May 1970, almost six months prior to the making of testator's holographic will.

Redfields, Inc. was a closely-held North Carolina corporation "engaged in general real estate business." On 26 August 1975, five years after testator made his will, the five shareholders of Redfields, Inc.—testator, testator's sisters Jane Stanford Paris and Jean Stanford Mann, testator's brother William Stanford, and the widow of testator's brother Donald Stanford—dissolved the corporation Redfields, Inc. and formed the partnership "Redfields" "[t]o carry on the business formally [sic] conducted by Redfields, Inc." Plaintiffs alleged that, "pursuant to the winding up of its corporate affairs," Redfields, Inc. conveyed "various tracts including property that is the subject of the present case" by general warranty deed to the Redfields partnership.

Upon the termination of the Redfields partnership in 1994 following the deaths of testator and testator's brother William Stanford, the property that had been conveyed from Redfields, Inc. to the Redfields partnership was distributed. The record shows that testator's sister Jane Stanford Paris, with her husband Oliver Johnson Paris, and testator's sister Jean Stanford Mann, with her husband Edward N. Mann, Jr., were among the grantees to whom the properties were conveyed by the Redfields partnership. Plaintiffs allege that, upon Redfields' liquidation, testator's sisters received a total of 60% of the Redfields partnership's property holdings—20% each from the sisters' own partnership interests in Redfields, and 10% each from the division of testator's 20% partnership interest in Redfields.

On 13 October 2006 and 9 November 2006, respectively, plaintiffs filed a Complaint for Declaratory Judgment and an Amendment to Complaint in Orange County Superior Court. Oliver Johnson Paris, both individually and as personal representative of testator's estate, and testator's sister Jean Stanford Mann and her husband Edward N. Mann, Jr. were named as "Level I" defendants, who were alleged to be "direct recipients" of property from testator's estate that had been held by the Redfields partnership. The named "Level II" defendants were those individuals and entities alleged to be "subsequent transferees of a portion" of this same property who each have "a current interest in said property." In their complaint, plaintiffs alleged that "[t]his is an action at law for declaratory judgment . . . as well as an action in equity for appropriate relief[, and] . . . is also an action to

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quiet title.” Plaintiffs asserted they “initiate[d] this action to determine the rights and responsibilities of the parties,” and to “ask the Court to answer the following:

- A. Should some portion of the estate of Charles W. Stanford, Jr. have been distributed according to the North Carolina Intestate Succession Act?
- B. If so, what property should have been distributed and to whom?
- C. If so, is there additional injury, and are additional damages due?
- D. If so, who bears the responsibility for the incorrect distribution and why?
- E. If so, should Defendant O.J. Paris be removed as the personal representative of the estate of Charles W. Stanford, Jr.; and should a new personal representative be appointed?
- G.<sup>1</sup> If so, what remedies ought to [sic] employed to accomplish the foregoing?

Each Level I and Level II defendant filed motions to dismiss plaintiffs’ complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). On 16 February 2007 and 20 February 2007, the trial court entered orders granting all Level I and Level II defendants’ motions to dismiss all claims, except those made against Level I defendant Oliver Johnson Paris—individually and as personal representative of testator’s estate—which were not related to the ownership of real property. Plaintiffs’ request for summary judgment as to all remaining claims was granted in part on 15 November 2007 with respect to two undevised assets—a 1984 Buick LaSabre and \$2,457.19 received by testator’s estate from North Carolina’s Unclaimed Property Program—which were ordered to be distributed according to North Carolina laws of intestate succession. In this same order, the trial court granted summary judgment in favor of defendant Oliver Johnson Paris with respect to testator’s interest in the Redfields partnership, based on the court’s determination that testator’s devise of Redfields, Inc. stock “did not adeem.” Plaintiffs filed a motion seeking relief from this order, which was denied on 19 March 2008.

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1. Plaintiffs did not include a question “F” in their 13 October 2006 Complaint.

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On 18 July 2008, the trial court entered a Partial Judgment By Consent in which it determined that the parties agreed “to settle any claims related to [the ‘improper distribution’ of the 1984 Buick LaSabre and the \$2,457.19] for a payment of \$7,000.00,” and provided that, “[p]ursuant to Rule 54 of the Rules of Civil Procedure, entry of this judgment resolves all remaining issues before the Court with respect to this action and thus constitutes the final judgment in this matter.” Plaintiffs filed their Notice of Appeal to this Court on 15 August 2008 from the trial court’s 18 July 2008 Partial Judgment by Consent, as well as from the court’s 16 February 2007 and 20 February 2007 Rule 12(b)(6) orders, the 15 November 2007 partial summary judgment order, and the court’s 19 March 2008 order denying plaintiffs’ Rule 60 motion.

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[1] Plaintiffs first contend testator’s devise to his sisters Jean Stanford Mann and Jane Stanford Paris of “all stock in Redfields, Inc. left to [him] by [his] father, Charles W. Stanford, Sr.” adeemed upon the 1975 dissolution, winding up, and termination of Redfields, Inc., and argue that testator’s interest in the later-formed Redfields partnership should not have passed to testator’s sisters Jean Stanford Mann and Jane Stanford Paris alone, to the exclusion of plaintiffs. We disagree.

“The principle of ademption is firmly imbedded in the law of wills, and is recognized in this jurisdiction as applicable to specific legacies as a rule of law rather than of particular intent on the part of the testator.” *Green v. Green*, 231 N.C. 707, 709, 58 S.E.2d 722, 723 (1950); *see also Shepard v. Bryan*, 195 N.C. 822, 828, 143 S.E. 835, 838 (1928) (“A specific legacy is the bequest of a particular thing or money specified and distinguished from all of the same kind, as of a horse, a piece of plate, money in a purse, stock in the public funds, a security for money, which would immediately vest with the assent of the executor.”). “An ademption is, quite simply, the extinguishment of a testamentary gift.” *Tighe v. Michal*, 41 N.C. App. 15, 18, 254 S.E.2d 538, 541 (1979); *see also Green*, 231 N.C. at 709, 58 S.E.2d at 724 (“[Ademption] denotes the act by which a specific legacy has become inoperative on account of the testator’s having parted with the subject of it.” (quoting *Rue v. Connell*, 148 N.C. 302, 304, 62 S.E. 306, 307 (1908))). Specific legacies are said to “be adeemed when in the lifetime of the testator the particular thing bequeathed is lost, destroyed, or disposed of, or it is changed in substance or form, so that it does not remain at the time the will goes into effect *in specie*, to pass to the legatees.” *Starbuck v. Starbuck*, 93 N.C. 183, 185 (1885);

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*Tighe*, 41 N.C. App. at 22, 254 S.E.2d at 543 (“[I]f the subject matter of any specific testamentary gift was not found *in specie* in [a testator’s] estate at the time of [his or] her death, that gift would ordinarily be defeated as a matter of law by the principle of ademption.”). Thus, in the present case, we must determine whether testator’s bequest of Redfields, Inc. stock remained *in specie* in his estate at the time of testator’s death.

Redfields, Inc. was a North Carolina corporation “engaged in general real estate business.” According to plaintiffs, between 1968 and 1969, testator’s father conveyed various tracts of land to Redfields, Inc. Testator’s father died testate in May 1970. In his will, testator’s father left testator and testator’s four siblings all of his stock in Redfields, Inc. Testator’s brother Donald Stanford, who died testate a few days after his father, left all of his real and personal property to his wife Patricia. Thus, in 1975, all outstanding shares of Redfields, Inc. were equally distributed among and held by testator, testator’s sisters Jean Stanford Mann and Jane Stanford Paris, testator’s brother William Stanford, and the widow of testator’s brother Donald Stanford—each of whom owned 100 shares of Redfields, Inc.

According to plaintiffs’ allegations, in August 1975, Redfields, Inc. filed its Articles of Dissolution “pursuant to the written consent of all of the shareholders.” Later that month, those same shareholders formed the partnership “Redfields” “[t]o carry on the business formally [sic] conducted by Redfields, Inc.” Just as the shares of Redfields, Inc. were evenly divided among its five shareholders, these same persons held a one-fifth interest in the net profits and losses of the Redfields partnership and had “equal rights in the management of the [Redfields] partnership business.” Further, according to the Redfields’ partnership agreement, “all the shareholders [of Redfields, Inc.] desire[d] to form a Partnership to carry on the business heretofore conducted by the corporation and . . . agreed to surrender all their respected [sic] shares to the corporation in consideration for the receipt as partners of the net assets of the corporation.” Moreover, the partnership agreement provided that “[t]he capital of the partnership shall consist of all the assets of Redfields, Inc., distributed in kind upon its liquidation.” (Emphasis added.) Thus, after making his 1970 will, testator, with his brother, sisters, and brother’s widow, transferred all of Redfields, Inc.’s assets—consisting of those properties originally acquired by testator’s father that are at issue in the present case—to the Redfields partnership, which was formed for the express purpose of “carry[ing] on the business formally [sic] conducted by Redfields, Inc.”

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Based on these circumstances, we do not agree with plaintiffs that testator's bequest of stock in Redfields, Inc. was sufficiently "changed in substance or form, so that it did not remain at the time the will [went] into effect *in specie*." See *Starbuck*, 93 N.C. at 185. Rather, we conclude that testator's gift of his Redfields, Inc. stock, which became the same proportional interest in the same assets left to testator by his father upon their transfer to the Redfields partnership, did remain in testator's estate *in specie* as personal property at the time of his death and, therefore, did not adeem upon the dissolution and termination of Redfields, Inc. See also *Bright v. Williams*, 245 N.C. 648, 651, 97 S.E.2d 247, 250 (1957) (determining that a partner's interest in a partnership is personal property, even when part of a partnership's assets is real estate) (citing N.C. Gen. Stat. § 59-56)); see, e.g., *Morrison v. Grandy*, 115 N.C. App. 170, 171-72, 443 S.E.2d 751, 752 (1994) (concluding that a testamentary gift did not adeem because, at the time of testator's death, the devise "remained in the estate," testator "retained legal title to the real estate," and the property was not put "out of [testator's] control"). Therefore, the trial court did not err by dismissing plaintiffs' complaint because plaintiffs did not allege facts sufficient to establish that they had a legal right to testator's interest in the Redfields partnership.

[2] Plaintiffs also assigned error to the trial court's 15 November 2007 order, in which the court determined that neither a 1984 Buick LaSabre nor \$2,457.19 received by testator's estate from North Carolina's Unclaimed Property Program were devised under testator's 1970 will, and ordered that this property be distributed according to North Carolina's laws of intestate succession in favor of plaintiffs. Plaintiffs sought relief from this order pursuant to N.C.G.S. § 1A-1, Rule 60 on the ground that the trial court "omitted an NCNB checking account of the testator" from the list of assets it determined should pass under the laws of intestacy, which was alleged to contain \$39,097.63 at the time of testator's death.

However, plaintiffs provide no legal argument in their brief in support of this assignment of error. Plaintiffs only direct this Court's attention to copies of three electronic mail messages sent to the trial court in response to the court's inquiry as to whether there was "any money, other than the escheat funds, that was not specifically bequeathed by the will." According to these e-mails: the estate filing reflected "a bank account labeled 'NCNB Checking Account'"; the funds in this account "were used to pay off debts of the estate or for specific bequests"; and there was "no property other than the Buick

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and the escheat money that could have passed under the rules of intestate succession.” The record before us contains no further information about this NCNB account, and plaintiffs present only the bare assertion in their primary brief that this was an “*intestate* checking account.” In the absence of any legal argument in support of this assignment of error, we must deem this assignment of error abandoned. *See* N.C.R. App. P. 28(b)(6) (amended Oct. 1, 2009) (“Assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned.”).

**[3]** Plaintiffs’ remaining arguments include claims that testator’s sisters and other named defendants are liable to plaintiffs under theories of mistake, constructive fraud, and breach of fiduciary duty. However, since these claims were neither alleged in plaintiffs’ complaint nor considered or determined by the trial court, we decline to address such matters.

Affirmed.

Judges STEPHENS and HUNTER, JR. concur.

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HONEYCUTT CONTRACTORS, INC. AND ARNOLD K. “TOBY” TALLEY, D/B/A CAROLINA INTERIORS, PLAINTIFFS, v. WILLIAM J. OTTO AND WIFE, ANN P. HENDRICKSON, DEFENDANTS V. CHRISTOPHER PLUMMER D/B/A LOG HOME CREATION AND/OR D/B/A VARNADO CONSTRUCTION D/B/A LOG HOME CREATION, THIRD PARTY DEFENDANT

No. COA10-270

(Filed 4 January 2011)

**1. Appeal and Error—preservation of issues—orders not appealed from—argument dismissed—no abuse of discretion**

Plaintiffs’ argument that the trial court erred in an action arising from a construction dispute by granting defendants’ motion for discovery sanctions and entering default judgment against plaintiff Honeycutt Contractors (“Honeycutt”) on defendants’ counterclaim was dismissed where neither of the orders were properly appealed from. Even assuming *arguendo* that the argument had been properly brought before the Court of Appeals, the trial court did not abuse its discretion as the trial court

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considered lesser sanctions and the sanctions imposed were appropriate in light of Honeycutt's actions in the case.

**2. Parties— individual never made party—default judgment erroneous**

The trial court erred in an action arising from a construction dispute by entering a default judgment against Bobby Honeycutt individually because he was never a party to the action. While defendants' counterclaim asserted that Bobby Honeycutt used Honeycutt Contractors, Inc. as a mere instrumentality and sought to pierce the corporate veil, defendants never joined Bobby Honeycutt individually as a third-party defendant to the action.

**3. Appeal and Error— sanctions—order not appealed— default judgment—based upon sanctions order**

Plaintiff Honeycutt Contractors ("Honeycutt") argument that the trial court erred in an action arising from a construction dispute by denying its motion to set aside a discovery sanctions order was dismissed where Honeycutt did not give notice of appeal from the order. Honeycutt's argument that the trial court erred by entering default judgment in favor of defendants was without merit as the argument was predicated upon Honeycutt's contentions pertaining to the discovery sanctions order.

Appeal by plaintiffs from judgment entered 10 November 2009 by Judge Laura J. Bridges in McDowell County Superior Court. Heard in the Court of Appeals 29 September 2010.

*Lecroy and Willcox, PLLC, by M. Alan LeCroy, for plaintiff-appellants.*

*Ferikes & Bleynat, PLLC, by Edward L. Bleynat, Jr. and Susan L. Evans, for defendant-appellees.*

STEELMAN, Judge.

Where Honeycutt failed to appeal the trial court's 18 February 2009 order imposing discovery sanctions and its order denying its motion to set aside the 18 February 2009 order, neither of these orders are properly before this Court for appellate review. Where Bobby Honeycutt was never made a party to this action, the trial court had no jurisdiction to enter default judgment against him in his individual capacity.

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I. Factual and Procedural Background

On 2 March 2006, Honeycutt Contractors, Inc. (Honeycutt) entered into a contract with William Otto and his wife, Ann Hendrickson (defendants) to be the general contractor for the construction of their residence. Honeycutt began construction, but shortly thereafter the parties began to have disputes. On 17 November 2006, Honeycutt was relieved as the general contractor.

On 8 March 2007, Honeycutt filed a claim of lien against defendants' real property, contending that it and Carolina Interiors<sup>1</sup> were owed \$190,667.47 for labor and materials. On 11 May 2007, Honeycutt and Carolina Interiors filed this action against defendants requesting a monetary judgment; a lien upon defendants' real property; authorization to sell the property in accordance with the provisions of Chapter 44A to satisfy its judgment lien; and attorneys' fees. On 23 July 2007, defendants filed an answer and a counterclaim. A third-party complaint was filed against Christopher Plummer. The allegations against Plummer are not relevant to this appeal.

On 12 March 2008, defendants served their "First Set of Requests for Admission, Interrogatories and Request for Production of Documents" upon Honeycutt's counsel. Honeycutt failed to timely respond to or answer the discovery requests. On 2 June 2008, Honeycutt answered the Interrogatories and Requests for Admissions. However, many answers were incomplete or non-responsive. Honeycutt completely failed to respond to defendants' Request for Production of Documents. On 17 June 2008, defendants filed a motion to compel. On 30 June 2008, the trial court determined that "the most appropriate manner to deal with issues involving discovery and technical analysis of the issues of this litigation is for the Court to order the appointment of two different referees to deal with two separate aspects of the issues in this case . . ." The trial court appointed a construction referee and an accounting referee.<sup>2</sup>

On 19 December 2008, Honeycutt's counsel filed a motion to withdraw. On 5 January 2009, defendants filed a motion for enforcement of order appointing referees, to compel discovery, for sanctions, and a response to Honeycutt's counsel's motion to withdraw. Defendants

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1. Carolina Interiors was a subcontractor employed to provide certain features to the residence, including kitchen cabinets and counter tops, bath features, and flooring.

2. Defendants' brief asserts that, by this time, Carolina Interiors had stipulated to a dismissal of its claims against defendants with prejudice. However, the order of dismissal is not included in the record of appeal.

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alleged that Honeycutt had prevented the referees from completing their duties by failing to produce necessary documents. On 14 January 2009, the trial court entered an order to compel and for sanctions. In the order, the trial court denied Honeycutt's counsel's motion to withdraw, ordered Honeycutt to fully comply with defendants' discovery requests and the referees' requests for information, sanctioned Honeycutt for its previous non-compliance, and explicitly warned Honeycutt that if it failed to provide the requested information by 16 January 2009, more severe sanctions may be imposed. On 18 February 2009, the trial court entered an order sanctioning Honeycutt for its failure to comply with its 14 January 2009 order. The trial court: (1) dismissed Honeycutt's complaint against defendants with prejudice; (2) cancelled Honeycutt's claim of lien; (3) ordered Honeycutt's pleadings stricken; (4) entered a default against Honeycutt on defendants' counterclaim; and (5) allowed Honeycutt's counsel to withdraw. Damages for defendants' counterclaim and monetary sanctions for Honeycutt's failure to prove its claim of lien were reserved for future determination.

On 18 August 2009, Honeycutt filed a motion to set aside the 18 February 2009 discovery sanctions order. On 10 November 2009, the trial court entered a default judgment against Honeycutt Contractors, Inc. and Bobby Honeycutt, individually, in the amount of \$846,123.21.<sup>3</sup> On 11 January 2010, the trial court denied Honeycutt's motion to set aside the 18 February 2009 order.

Honeycutt and Bobby Honeycutt, individually, appeal only the judgment entered on 10 November 2009. No appeal was entered with respect to the 18 February 2009 discovery sanctions order or the 11 January 2010 order denying the motion to set aside the discovery sanctions order.

**II. Rule 37 Discovery Sanctions**

**[1]** In its first argument, Honeycutt contends that the trial court erred by granting defendants' motion for discovery sanctions pursuant to Rule 37 of the Rules of Civil Procedure and entering default judgment against Honeycutt Contractors, Inc. on defendants' counterclaim. We disagree.

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3. It appears that the trial court awarded defendants \$197,878.10 in compensatory damages, \$593,634.30 in treble damages, and then added them together with \$54,610.81 in attorneys' fees to equal the amount of the judgment. No question of whether the amount of damages was proper has been raised before this Court, and this opinion should not be construed as an approval of the amount of damages.

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[209 N.C. App. 180 (2011)]

We first note that Honeycutt did not appeal from the discovery sanctions order of 18 February 2009 or the 11 January 2010 order denying its motion to set aside the discovery sanctions order. Neither of these orders are properly before this Court for appellate review. N.C.R. App. P. 3(a),(d) (2011); *see also Bromhal v. Stott*, 116 N.C. App. 250, 253, 447 S.E.2d 481, 483 (1994) (“Rule 3[] of the North Carolina Rules of Appellate Procedure requires that a notice of appeal ‘must designate the judgment or order from which appeal is taken.’ Without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2.” (citations omitted), *aff’d*, 341 N.C. 702, 462 S.E.2d 219 (1995). We therefore dismiss this argument made by Honeycutt.

Even assuming *arguendo* that this argument had been properly brought before this Court, we would hold that it would be without merit. Honeycutt contends that the trial court completely failed to consider other possible sanctions and solutions other than an outcome determinative order. “The choice of sanctions under Rule 37 lies within the court’s discretion and will not be overturned on appeal absent a showing of abuse of that discretion.” *Routh v. Weaver*, 67 N.C. App. 426, 429, 313 S.E.2d 793, 795 (1984) (citation omitted). Rule 37(b)(2) of the Rules of Civil Procedure expressly provides that the trial court may enter “[an] order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default” against any party that fails to permit discovery. N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)c (2009). North Carolina appellate courts have held that before imposing sanctions dismissing an action or entering a default judgment against the offending party, the trial court must consider lesser sanctions. *Goss v. Battle*, 111 N.C. App. 173, 176, 432 S.E.2d 156, 159 (1993); *see also Badillo v. Cunningham*, 177 N.C. App. 732, 734, 629 S.E.2d 909, 911, *aff’d per curiam*, 361 N.C. 112, 637 S.E.2d 538 (2006). Where the record on appeal indicates that the trial court considered lesser sanctions, its ruling will not be reversed unless the trial court abused its discretion. *Badillo*, 177 N.C. App. at 734, 629 S.E.2d at 911.

In the instant case, the trial court made the following finding of fact in its discovery sanctions order:

*The Court has considered lesser sanctions, and has determined that they are not adequate to address the circumstances before*

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*the Court.* The plaintiff's failure to make complete discovery, going back to the responses required to be made to defendants' discovery requests served in March, 2008, and plaintiff's repeated failure to provide information required to fulfill its obligations under the North Carolina Rules of Civil Procedure, the requests of the Referees, and the Orders of the Court, constitute a pattern which render dismissal of plaintiff's complaint, cancellation of its claim of lien, and the striking of its pleadings, necessary and proper sanctions to be entered.

(Emphasis added.) Honeycutt argues that the order completely fails to list the other possible discovery sanctions considered. However, this Court has held that "the trial court is not required to list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate." *Id.* at 735, 629 S.E.2d at 911. The above finding was sufficient to show that the trial court considered lesser sanctions before dismissing Honeycutt's action against defendants and entering default judgment against Honeycutt on defendants' counterclaim. *Id.; In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251, 618 S.E.2d 819, 829 (2005), *disc. review denied*, 360 N.C. 290, 628 S.E.2d 382 (2006).

Further, the sanctions imposed were appropriate in light of Honeycutt's actions in this case. Honeycutt failed to timely respond to or answer defendants' initial discovery requests. On 30 June 2008, the trial court appointed two separate referees to streamline the discovery process and deal with technical issues, and ordered the parties to "cooperate fully and completely with the referees[.]" Honeycutt failed to comply with the trial court's 30 June 2008 order by not providing information requested by the referees. On 14 January 2009, the trial court entered an order to compel and for sanctions based upon Honeycutt's non-compliance. The trial court ordered Honeycutt to pay defendants' attorneys' fees from 1 December 2009 through 13 January 2009. The trial court explicitly warned Honeycutt of the potential consequences of its continued failure to comply: "the Court may impose more severe sanctions on [Honeycutt] for non-compliance with discovery requests, up to and including dismissal of his Complaint and Claim of Lien against defendants and an entry of default against [Honeycutt] on behalf of defendants regarding defendants' Counterclaim in this matter." Despite this warning, Honeycutt failed to comply with the trial court's order. The trial court did not abuse its discretion by dismissing Honeycutt's complaint against

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defendants and entering default judgment against that entity on defendants' counterclaim.

III. Entry of Default Judgment Against  
Bobby Honeycutt, Individually

**[2]** Bobby Honeycutt argues that the trial court erred by entering default judgment against him, individually, because he was never a party to this action. We agree.

The eleventh count of defendants' counterclaim asserted that Bobby Honeycutt used Honeycutt Contractors, Inc. as a mere instrumentality and sought to pierce the corporate veil. However, defendants never joined Bobby Honeycutt, individually, as a third-party defendant to the action. Nothing in the record of this case shows that Bobby Honeycutt, individually, was ever served with a summons or named as a party to this lawsuit. The 18 February 2009 discovery sanctions order does not mention Bobby Honeycutt, individually. The first mention of Bobby Honeycutt, individually, is in the judgment of 10 November 2009, where he was made jointly and severally liable for \$846,123.21 plus costs. This judgment was properly appealed from by Bobby Honeycutt, individually.

In order to render a valid judgment against a [party], it is essential that jurisdiction be obtained by the court in some way allowed by law. When a court has no authority to act, its acts are void. One cannot be brought into a lawsuit without his consent either expressed or by entering a general appearance, except by causing summons to be served upon him.

*Southern Athletic/Bike v. House of Sports, Inc.*, 53 N.C. App. 804, 806, 281 S.E.2d 698, 699 (1981) (internal quotation, citation, and ellipses omitted), *disc. review denied and appeal dismissed*, 304 N.C. 729, 288 S.E.2d 381 (1982); *see also Hayman v. Ramada Inn, Inc.*, 86 N.C. App. 274, 280, 357 S.E.2d 394, 398 (1987) (“It is an elementary rule of civil procedure that a person or entity may not be made a party to a lawsuit without having been properly served with process in a manner prescribed by statute.” (citations omitted)).

In the instant case, Bobby Honeycutt, individually, was never a party to this action. Defendants' allegation of “piercing the corporate veil” was merely a theory of liability; it did not confer jurisdiction upon the court over an individual who was never a party to the action. We vacate the portion of the order entering a default judgment against Bobby Honeycutt, individually. *See Polygenex Int'l, Inc. v.*

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*Polyzen, Inc.*, 133 N.C. App. 245, 248, 515 S.E.2d 457, 460 (1999) (vacating Rule 11 sanctions against a corporate officer, in his individual capacity, where he was not a party to the action and was never served with a summons).

**IV. Motion to Set Aside Sanction Order and Entry of Default**

[3] In its remaining arguments, Honeycutt contends that the trial court erred by denying its motion to set aside the discovery sanctions order and entering a default judgment in favor of defendants. We disagree.

As discussed above, Honeycutt did not give notice of appeal from the order denying its motion to set aside the sanctions order and this argument is dismissed. Honeycutt's argument as to the entry of default is predicated entirely upon its contentions pertaining to the discovery sanctions order of 18 February 2009. For the reasons set forth in Section II of this opinion, this argument is without merit.

DISMISSED IN PART; VACATED IN PART.

Judges BRYANT and ERVIN concur.

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STATE OF NORTH CAROLINA v. MICKEY JAMES DEWALT

No COA10-559

(Filed 4 January 2011)

**1. Motor Vehicles— felony speeding to elude arrest—aggravating factor—driving while license revoked—jury instruction correct**

The trial court did not err in instructing the jury that the factor of driving while license revoked under N.C.G.S. § 20-11.5(b)(5) in aggravation of the offense of felony speeding to elude arrest did not require a showing that defendant was on a highway or street. The aggravating factor does not require the same proof as the offense of driving while license revoked under N.C.G.S. § 20-28(a).

**2. Motor Vehicles— felony speeding to elude arrest—lesser-included offense—no jury instruction required**

The trial court did not err in denying defendant's request for a jury instruction on the lesser-included offense of misdemeanor

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speeding to elude arrest. The State presented uncontroverted evidence as to each element of speeding to elude arrest and the presence of two listed aggravating factors required to make this offense a felony.

Appeal by defendant from judgment entered 24 September 2009 by Judge Judson D. DeRamus, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 2 November 2010.

*Attorney General Roy Cooper, by Assistant Attorney General William P. Hart, Jr., for the State.*

*Paul Y.K. Castle for defendant-appellant.*

BRYANT, Judge.

Where the statute defining the offense of speeding to elude arrest does not specify that a particular aggravating factor must be proved as required for conviction of a separate offense under a different statute, the trial court does not err in so instructing the jury. Where the evidence at trial is clear and positive as to each element of the offense charged and no evidence supports a lesser-included offense, the trial court need not instruct on the lesser-included offense.

*Facts*

On 23 October 2008, Detective Donald Frank Talley of the Yadkin County Sheriff's Office and Detective Farron Grey Jester of the Yadkinville Police Department were attempting to locate defendant Mickey James Dewalt in connection with a warrant against him. The detectives were familiar with defendant from past encounters, and Det. Talley had spoken with defendant on numerous occasions. Believing defendant was at a shopping center in Forsyth County, the detectives contacted the sheriff's department there and asked for assistance in apprehending defendant. Two members of the Forsyth County Sheriff's Department, Deputy Christopher Barry Davenport and another officer, waited in marked patrol cars behind the shopping center, while the Yadkin detectives waited in an unmarked patrol car in the front parking lot.

At about 5:45 p.m. that day, the detectives saw defendant drive into the parking lot in a Land Rover and alerted the Forsyth County officers. The two Forsyth officers drove around to the front parking lot with blue lights activated and pulled up to defendant's vehicle. Deputy Davenport got out of his patrol car with his weapon drawn,

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called defendant by name, informed him he was under arrest, and ordered him to put his hands out of the vehicle window. Instead, defendant drove forward over a concrete parking median, narrowly missing the marked patrol cars, crossed a grassy area and drove along the entrance/exit road of the shopping center toward Shallowford Road. The deputies were unable to see what happened thereafter, and when they reached Shallowford Road, defendant's vehicle had disappeared from view.

At that point, they received word that a vehicle matching the description of defendant's Land Rover had been located at 120 Sunny Acres Lane. This address is a residential property with a large yard adjacent to the shopping center. When the deputies arrived, they found the Land Rover stuck in a ditch across the street from the home. Tire tracks suggested the vehicle had traveled from Shallowford Road across the grassy yard of the home, across Sunny Acres Lane and then into the ditch. A minor child who lived at the residence testified that he had been in his yard playing soccer that day when he heard sirens. Shortly thereafter, the child saw the vehicle drive off Shallowford Road across his yard, at which point the driver jumped out and ran into some nearby woods. The vehicle continued to roll on its own until it became stuck in the ditch.

On 23 September 2009, defendant was tried before a jury on charges of felony fleeing to elude arrest, resisting a public officer, reckless driving to endanger, driving while license revoked, and having attained the status of habitual felon. At the jury charge conference, defense counsel objected to an instruction on felony fleeing to elude arrest, contending that the statutorily required two aggravating factors were not present. The State alleged that the aggravating factors present were reckless driving and driving while license revoked, and the indictment alleged defendant had operated his vehicle on the 6900 block of Shallowford Road and on Sunny Acres Lane. Defendant argued that the evidence did not show that he drove on any public street or highway but only that he had driven in the shopping center parking lot, a public vehicular area not sufficient to support a driving while license revoked charge. The trial court stated that, when used as an aggravating factor for felony speeding to elude arrest, driving while license revoked does not require a showing that the defendant drove on a public highway or street. Over defendant's objection, the trial court instructed the jury that it could convict based on defendant driving on a public vehicular area. Further, the trial court instructed the jury only on felony speeding to elude arrest

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and did not instruct on the lesser included offense of misdemeanor speeding to elude arrest.

Following a trial, the jury returned guilty verdicts for the first four offenses, and defendant changed his plea from not guilty to guilty on the habitual felon charge. The trial court sentenced defendant to 100 to 129 months plus 120 days in prison. Defendant appeals.

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On appeal, defendant argues the trial court committed reversible error in (I) instructing the jury that the factor of driving while licence revoked in aggravation of the offense of felony speeding to elude arrest did not require a showing that he was on a highway or street and (II) denying his request for a jury instruction on a lesser included offense.

*I*

[1] Defendant first argues that the trial court committed reversible error in instructing the jury. Specifically, he asserts that it was error to instruct the jury that the factor of driving while licence revoked used in aggravation of the offense of felony speeding to elude arrest does not require a showing that he was on a highway or street, rather than on a public vehicular area. We disagree.

“Failure to instruct on each element of a crime is prejudicial error requiring a new trial.” *State v. Lanier*, 165 N.C. App. 337, 354, 598 S.E.2d 596, 607, *disc. review denied*, 359 N.C. 195, 608 S.E.2d 59 (2004). Prejudicial error is defined as a question of whether “there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” N.C. Gen. Stat. § 15A-1443(a) (2009).

Speeding to elude arrest is defined as operating “a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties.” N.C. Gen. Stat. § 20-141.5(a) (2009). This offense is a felony if any two of the eight aggravating factors listed in the statute are present; one of those factors is “[d]riving when the person’s drivers license is revoked.” N.C.G.S. § 20-141.5(b)(5).

Defendant argues that the driving while license revoked aggravating factor under § 20-141.5(b)(5) requires the same proof as the offense of driving while license revoked under N.C. Gen. Stat. § 20-28(a) (2009). Section 20-28 specifies that the offense of driving while license revoked occurs when an operator whose license has

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been revoked “drives any motor vehicle upon the highways of the State[.]” *Id.* Thus, § 20-28 does not, by its plain language, apply when an operator whose license has been revoked drives in public vehicular areas. This is in contrast to other driving-related offenses which can occur when an operator drives on a “street, highway, or public vehicular area[.]” See N.C.G.S. § 20-141.5; see also N.C. Gen. Stat. § 20-138.1 (2009) (impaired driving); N.C. Gen. Stat. § 20-140 (2009) (reckless driving). Defendant contends that aggravating factor (b)(5) requires proof that he operated his vehicle on a public highway and contends that his argument is supported by *State v. Funchess*, 141 N.C. App. 302, 540 S.E.2d 435 (2000). We disagree.

In *Funchess*, the “defendant argue[d] that, since ‘driving while driver’s license is revoked’ was one of the three named aggravating factors that led to his conviction under N.C. Gen. Stat. § 20-141.5(b)(5), the trial court should have charged the jury on the elements of the offense of driving with a revoked license, particularly the element of knowledge.” *Id.* at 310-11, 540 S.E.2d at 440. However, because of factual circumstances of that case, we did “not reach the question of whether the trial court is required to charge the jury on the elements of the separate crimes which serve to enhance the status of speeding to elude arrest to that of a felony.” *Id.* at 311, 540 S.E.2d at 441. Thus, *Funchess* has no precedential value as to defendant’s argument.

In considering this matter of first impression, we find defendant’s argument unpersuasive. Our cardinal rule in statutory construction is to give plain meaning to statutory language that is expressed clearly and unambiguously. *State v. Jones*, 358 N.C. 473, 477, 598 S.E.2d 125, 128 (2004). Here, aggravating factor (b)(5) does not require a showing that a defendant was driving on a highway or street when his license was revoked. Rather, only the underlying offense of speeding to elude arrest specifies a location, stating that it occurs when a person operates a “motor vehicle on a *street, highway, or public vehicular area* while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties.” N.C.G.S. § 20-141.5(a) (emphasis added). In turn, the eight listed aggravating factors must only be shown to have been “present at the time the violation occurs[.]” N.C.G.S. § 20-141.5(b).

As to defendant’s contention regarding § 20-28, we draw his attention to another well-known canon of statutory construction, *expressio unius est exclusio alterius*: the expression of one thing is

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the exclusion of another. *See Baker v. Martin*, 330 N.C. 331, 337, 410 S.E.2d 887, 890-91 (1991). The speeding to elude arrest statute cites several other criminal statutes when defining aggravating factors which support the felony level of this offense:

(3) Reckless driving as proscribed by G.S. 20-140.

...

(6) Driving in excess of the posted speed limit, during the days and hours when the posted limit is in effect, on school property or in an area designated as a school zone pursuant to G.S. 20-141.1, or in a highway work zone as defined in G.S.20-141(j2).

(7) Passing a stopped school bus as proscribed by G.S. 20-217.

N.C.G.S. § 20-141.5(b). However, the statute does not cite § 20-28 when listing the aggravating factor “[d]riving when the person’s drivers license is revoked.” N.C.G.S. § 20-141.5(b)(5). Thus, the plain language of § 20-141.5 reveals that, while the General Assembly chose to cross-reference criminal statutes in defining the scope of certain aggravating factors, it chose not to do so in defining aggravating factor (b)(5). This argument is overruled.

*II*

[2] Defendant also argues that the trial court committed reversible error in denying his request for a jury instruction on the lesser-included offense of misdemeanor speeding to elude arrest. We disagree.

A trial court must give instructions on all lesser-included offenses that are supported by the evidence, even in the absence of a special request for such an instruction; and the failure to so instruct constitutes reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense. The trial court may refrain from submitting the lesser offense to the jury only where the evidence is clear and positive as to each element of the offense charged and no evidence supports a lesser-included offense.

*State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001) (internal citations and quotations omitted). However, “[a] defendant is not entitled to an instruction on a lesser[-]included offense merely because the jury could possibly believe some of the State’s evidence but not all of it.” *State v. Annadale*, 329 N.C. 557, 568, 406 S.E.2d 837, 844 (1991) (citation omitted).

**KEE v. CAROMONT HEALTH, INC.**

[209 N.C. App. 193 (2011)]

Defendant bases this argument on his contentions as to Issue I. Having rejected that argument, we do the same here. The State presented uncontroverted evidence as to each element of speeding to elude arrest and the presence of two listed aggravating factors required to make this offense a felony. Thus, defendant was not entitled to an instruction on the lesser-included offense of misdemeanor speeding to elude arrest. This argument is overruled.

No error.

Judges STROUD and BEASLEY concur.

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ANDRE M. KEE, EMPLOYEE, PLAINTIFF v. CAROMONT HEALTH, INC., EMPLOYER, SELF-INSURED, KEY RISK SERVICES, INC., THIRD-PARTY ADMINISTRATOR, CARRIER, DEFENDANTS

No. COA10-913

(Filed 4 January 2011)

**Workers' Compensation— settlement agreement—required language omitted—not enforceable**

A workers' compensation settlement agreement did not comply with the Industrial Commission rules where it did not contain explicit language that "no rights other than those arising under the provisions of the Workers' Compensation Act are compromised or released." Even if a resignation and release provision was severable from the agreement as a whole, as defendant contended, the Commission correctly refused to enforce the agreement.

Appeal by defendants from opinion and award entered 23 April 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 December 2010.

*The Sumwalt Law Firm, by Vernon Sumwalt, for plaintiff-appellee.*

*Cranfill Sumner & Hartzog LLP, by Lawrence M. Baker, for defendant-appellants.*

CALABRIA, Judge.

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[209 N.C. App. 193 (2011)]

Caromont Health, Inc. (“Caromont”) and Key Risk Services, Inc. (collectively “defendants”) appeal an Opinion and Award of the North Carolina Industrial Commission (“the Commission”) refusing to enforce defendants’ mediated settlement agreement with Andre M. Kee (“plaintiff”). We affirm.

I. Background

Plaintiff was employed as a Certified Nursing Assistant for Caromont. On 15 January 2008, plaintiff reported to Caromont that she had injured her back while turning a patient in a hospital bed. Caromont reported plaintiff’s injury to the Commission on 21 January 2008. After the injury, plaintiff continued to work under light duty restrictions until she was taken out of work by her doctor on 16 June 2008. On that same day, plaintiff filed a Form 33 request for hearing with the Commission.

On 18 September 2008, plaintiff and defendants conducted a mediated settlement conference regarding plaintiff’s injury. At the conference, defendants offered plaintiff two options: defendants were willing to either (1) accept plaintiff’s claim as compensable and have her return to a light duty job or (2) pay plaintiff a lump sum settlement and require her to resign and release all of her employment rights. Plaintiff agreed to accept the lump sum settlement offer, and the parties each executed a mediated settlement agreement (“the settlement agreement”).

In the settlement agreement, defendants agreed to pay plaintiff \$20,000.00, and in return, plaintiff agreed to execute a standard compromise settlement agreement that complied with N.C. Gen. Stat. § 97-17. In addition, defendant agreed to pay the costs of the mediation and plaintiff agreed to pay all of her medical expenses. Finally, the settlement agreement stated that plaintiff “will resign and execute an employment release with her share of the mediation cost being consideration.<sup>1</sup>”

After the mediation conference was completed, defendants’ counsel prepared a “Final Compromise Settlement Agreement and Release” and presented it to plaintiff. However, plaintiff refused to sign this agreement. Consequently, defendants filed a request with the Commission to enforce the settlement agreement on 19 January 2009.

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1. This provision will subsequently be referred to as “the resignation and release provision.”

**KEE v. CAROMONT HEALTH, INC.**

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A hearing on defendants' request to enforce the settlement agreement was conducted on 12 March 2009. After the hearing, Deputy Commissioner Phillip A. Holmes entered an Opinion and Award approving the settlement agreement on 27 May 2009. Plaintiff appealed to the Full Commission. On 23 April 2010, the Commission entered an Opinion and Award holding that the settlement agreement failed to comply with both statutory requirements and Industrial Commission rules. As a result, the Commission refused to enforce the settlement agreement. Defendants appeal.

**II. Standard of Review**

This Court reviews an award from the Commission to determine: "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). "Where there is competent evidence to support the Commission's findings, they are binding on appeal even in light of evidence to support contrary findings." *Starr v. Gaston Cty. Bd. of Educ.*, 191 N.C. App. 301, 304-05, 663 S.E.2d 322, 325 (2008). "Moreover, findings of fact which are left unchallenged by the parties on appeal are presumed to be supported by competent evidence and are, thus conclusively established on appeal." *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (internal quotations and citation omitted). The Commission's conclusions of law are reviewed *de novo*. *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

**III. Settlement Agreement**

Defendants argue that the Commission erred by refusing to enforce the settlement agreement. Specifically, defendants contend that the Commission should have severed the resignation and release provision of the settlement agreement. Defendants argue that once this portion of the settlement agreement was severed, the settlement agreement fully complied with all statutory and Industrial Commission rule requirements. We disagree.

Initially, we note that "[c]ompromise settlement agreements, including mediated settlement agreements, are governed by general principles of contract law." *Lemly v. Colvard Oil Co.*, 157 N.C. App. 99, 103, 577 S.E.2d 712, 715 (2003) (internal quotations and citation omitted). Settlements between employers and employees in workers' compensation cases are authorized by N.C. Gen. Stat. § 97-17 (2009).

## IN THE COURT OF APPEALS

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To make its purpose that the North Carolina Workmen's Compensation Act shall be administered exclusively by the North Carolina Industrial Commission effective, the General Assembly has empowered the said Industrial Commission to make rules, not inconsistent with this act, for carrying out the provisions of the act . . . . The North Carolina Industrial Commission also has the power to construe and apply such rules[, the construction and application of which] . . . ordinarily are final and conclusive and not subject to review by the courts of this State on an appeal from an award made by said Industrial Commission.

*Chaisson*, 95 N.C. App. at 473, 673 S.E.2d at 158 (internal quotations and citations omitted). Pursuant to this authority, the Commission has adopted rules that govern compromise settlement agreements under N.C. Gen. Stat. § 97-17. At issue in the instant case is Rule 502 (2)(e), which states, in relevant part:

No compromise agreement will be approved unless it contains the following language or its equivalent:

(e) That no rights other than those arising under the provisions of the Workers' Compensation Act are compromised or released.

Workers' Comp. R. of N.C. Indus. Comm'n 502(2)(e), 2010 Ann. R. N.C. 1030. In the instant case, the Commission made the following finding of fact:

28. In addition to finding that the Final Compromise Settlement Agreement and Release is not fair and just and in the best interests of all parties, the Full Commission further finds that the Mediated Settlement Agreement is not enforceable as a compromise settlement agreement because it does not meet the requirements of Industrial Commission Rule 502(2)(e) as "rights other than those arising under the provisions of the Workers' Compensation Act" were compromised and released in this settlement agreement. The language contained in and constituting a part of the Mediated Settlement Agreement itself that, "E-II (Employee-plaintiff) will resign and execute an employment release with her share of the mediation cost being consideration" shows that "rights other than those arising under the provisions of the Workers' Compensation Act" were compromised and released in this settlement agreement. The Full Commission is not waiving this Rule requirement.

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Defendants do not dispute this finding of fact; instead, they argue that it is inconsequential that the settlement agreement violated Rule 502(2)(e). Defendants contend that the offending portion of the settlement agreement is severable from the agreement as a whole and “the Industrial Commission may still enforce those provisions over which it does have jurisdiction under general contract principles allowing unenforceable provisions of a contract to be severed from those provisions which are unenforceable.” In support of their argument, defendants cite this Court’s holding in *Am. Nat'l Elec. Corp. v. Poythress Commer. Contr'rs., Inc.*, 167 N.C. App. 97, 101, 604 S.E.2d 315, 317 (2004) (“When a contract contains provisions which are severable from an illegal provision and are in no way dependent upon the enforcement of the illegal provision for their validity, such provisions may be enforced.” (internal quotations and citations omitted)) and Restatement (Second) of Contracts § 184 (1981) (“If less than all of an agreement is unenforceable . . . a court may nevertheless enforce the rest of the agreement . . . if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.”).

While defendants have cited to a correct principle of contract law, this severability principle is immaterial to the instant case. Even assuming, *arguendo*, that the resignation and release provision was severable from the remainder of the settlement agreement, the agreement would still not comply with Rule 502(2)(e). Rule 502(2)(e) explicitly states that a settlement agreement *must contain language* that “no rights other than those arising under the provisions of the Workers’ Compensation Act are compromised or released.” Workers’ Comp. R. of N.C. Indus. Comm’n 502(2)(e), 2010 Ann. R. N.C. 1030. This language does not appear anywhere within the settlement agreement, whether or not it contains the resignation and release provision. In order to hold that the settlement agreement complied with Rule 502(2)(e), this Court “would be required to add language, rather than simply excise portions of the agreement[] which violate the [rule,]” and that is not the role of our courts. *Jackson v. Associated Scaffolders & Equip. Co.*, 152 N.C. App. 687, 691, 568 S.E.2d 666, 668-69 (2002).

The settlement agreement did not comply with Rule 502(2)(e). Although the Commission “has discretionary authority to waive its rules where such action does not controvert the provisions of the statute[,]” *Hyatt v. Waverly Mills*, 56 N.C. App. 14, 25, 286 S.E.2d 837, 843 (1982), it did not waive the enforcement of Rule 502(2)(e) in the

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instant case. Therefore, the Commission appropriately refused, under its rules, to enforce the settlement agreement. This argument is overruled.

**IV. Conclusion**

The settlement agreement did not comply with the rules established by the Commission, even if the resignation and release provision was severed from the settlement agreement. Consequently, the Commission correctly refused to enforce the agreement. Since the Commission's decision can be affirmed on this basis alone, it is unnecessary to address defendants' remaining arguments. The Commission's Opinion and Award is affirmed.

Affirmed.

Judges HUNTER, Robert C. and ELMORE concur.

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WILLIAM E. THOMAS EMPLOYEE, PLAINTIFF v. CONTRACT CORE DRILLING & SAWING, EMPLOYER, STONEWOOD INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA10-438

(Filed 4 January 2011)

**Appeal and Error— interlocutory orders and appeals—partial Industrial Commission opinion**

An appeal from the Industrial Commission was dismissed where the opinion and award reserved the issues of the extent of the temporary disability and permanent partial disability. No substantial right would have been lost without immediate review.

Appeal by defendants from Opinion and Award entered 21 January 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 October 2010.

*The Sumwalt Law Firm, by Mark T. Sumwalt and Vernon Sumwalt, for plaintiff-appellee.*

*Brooks, Stevens & Pope, P.A., by Matthew P. Blake, for defendants-appellants.*

MARTIN, Chief Judge.

**THOMAS v. CONTRACT CORE DRILLING & SAWING**

[209 N.C. App. 198 (2011)]

On 4 October 2007, William Thomas suffered an injury to his left knee while working as a concrete cutter for defendant Contract Core Drilling & Sawing. The injury occurred when Mr. Thomas was attempting to throw a drop cord to another worker through an elevator shaft from the 7th floor to the 8th floor. Although Mr. Thomas realized that he was in an area with a “step down,” which was one to two inches lower than the floor around it, he neither noticed it nor intended to step into the “step down.” Mr. Thomas did, however, step off with his left leg into the “step down,” causing all the weight to go onto that leg and, as he described in his 17 October 2007 recorded statement, his knee “snapped or whatever happened popped.” He then immediately fell to the floor.

The following day, on 5 October 2007, Mr. Thomas went to see a physician at Pro-Med and was diagnosed with a left knee strain and possibly an ACL or collateral ligament tear. The physician at Pro-Med restricted him to walking no more than 50% of the day and work that would permit seated and walking periods. Mr. Thomas attempted to work the rest of the day on 5 October 2007 but, after that day, was not able to return to work.

On 22 October 2007, defendant carrier, Stonewood Insurance Company, executed an IC Form 61 denying the claim on the grounds that the injury did not occur by an accident arising out of and in the course of employment. On approximately 1 November 2007, Mr. Thomas called defendant-employer, Contract Core Drilling & Sawing, in order to inquire about his workers’ compensation claim. He was informed that his claim was denied and his employment was terminated.

On 3 January 2008, Mr. Thomas filed an IC Form 33 requesting a hearing compelling defendants to compensate him for days of work missed, to pay his medical expenses and to pay him compensation for permanent partial disability.

Having lost his insurance through Contract Core Drilling & Sawing, Mr. Thomas became eligible for insurance through his wife’s employment sometime in February 2008. He then saw Dr. Fleischli on 27 February 2008. Dr. Fleischli diagnosed chondromalacia of the patella in Mr. Thomas’s left knee. He prescribed a cortisone shot and recommended an MRI. On July 3, 2008, the MRI revealed a tear of the medial meniscus. Surgery was performed on 9 August 2008. Dr. Fleischli testified at his deposition that Mr. Thomas’s 4 October 2007 injury had aggravated his pre-existing chondromalacia and caused the meniscus tear. On 14 July 2009, the Deputy Commissioner

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awarded Mr. Thomas temporary total disability compensation and reserved the issue of compensation for permanent partial disability for a future decision. Defendants appealed the award of the Deputy Commissioner to the Full Commission. On 21 January 2010, the Full Commission entered the following findings of fact:

Plaintiff has not returned to work since October 5, 2007 and defendant-employer has not offered any work to accommodate his restrictions. At his deposition Dr. Fleischli stated that prior to the August 9, 2008 surgery, plaintiff had work restrictions of no kneeling, squatting, crawling, or heavy lifting. After the surgery, plaintiff was taken out of work for approximately twelve weeks. Plaintiff testified at the hearing before the Deputy Commissioner on November 13, 2008, that he had not been able to find work but that he also had not looked for work. However, it does not appear from the record that as of the hearing plaintiff had been told by Dr. Fleischli that he no longer had work restrictions. Also, as of that date plaintiff had not had sufficient time and opportunity to look for work in order to show whether he had any continuing disability as a result of the compensable injury. At the hearing plaintiff stated that his knee was “giving him a fit” and that his left leg “wants to fall out from under” him.

The Commission then concluded that the record contained “insufficient evidence regarding whether, after November 13, 2008, plaintiff was unable to obtain employment after a reasonable effort or whether it was futile for him to seek employment because of other factors.” The Commission awarded Mr. Thomas temporary total disability compensation for the time period of 6 October 2007 through 13 November 2008. The Commission reserved the issue of compensation for permanent partial disability for a future decision and reserved the issue of the extent of plaintiff’s disability, if any, after 13 November 2008 for future determination or agreement by the parties.

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Defendants appeal, arguing that the Commission’s findings of fact are not supported by competent evidence or are contrary to law. They specifically argue that Mr. Thomas’s expert opinion evidence was inadequate and that the Commission failed by not answering crucial questions of fact, by relying on a purely subjective test to determine whether the “step down” was accidental, and by reserving issues for the taking of additional evidence. Before addressing their appeal, we must first consider Mr. Thomas’s motion to dismiss a portion of the appeal. Because we find that the appeal is interlocutory and thus premature, we do not reach the merits of defendants’ appeal.

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Mr. Thomas argues that the portion of the Opinion and Award which reserved the issue of whether he was disabled after 13 November 2008 for a future hearing is interlocutory and should be dismissed, but asserts that the portion of the Opinion which determined that his injury was by “accident” should not be dismissed as interlocutory because it implicates a substantial right. We conclude the appeal is wholly interlocutory, that no substantial right of defendants will be lost which may not be corrected if not reviewed before a final Opinion and Award by the Commission, and should be dismissed.

“A decision of the Industrial Commission that determines one but not all of the issues in a case is interlocutory, as is a decision which on its face contemplates further proceedings or ‘does not fully dispose of the pending stage of the litigation.’” *Berardi v. Craven County Schools*, — N.C. App. —, —, 688 S.E.2d 115, 116 (2011) (quoting *Cash v. Lincare Holdings*, 181 N.C. App. 259, 263, 639 S.E.2d 9, 13 (2007)), *disc. review denied*, 364 N.C. 239, 698 S.E.2d 74 (2011). We can find no precedent to treat an Award and Opinion in the piecemeal, partially interlocutory and partially non-interlocutory, manner as Mr. Thomas urges us to do. *See Plummer v. Kearney*, 108 N.C. App. 310, 313, 423 S.E.2d 526, 529 (1992) (“Even if the parties request and agree that only a specific issue rather than the entire controversy is to be decided by the Commission at a particular hearing, the order which issues is not a final order.”) (citing *Fisher v. E. I. Du Pont De Nemours*, 54 N.C. App. 176, 177-78, 282 S.E.2d 543, 544 (1981) (parties cannot by agreement modify the scope of appellate review prescribed by statute)). Sound public policy exists justifying our policy of not entertaining appeals from interlocutory orders. *Shaver v. N.C. Monroe Const. Co.*, 54 N.C. App. 486, 487, 283 S.E.2d 526, 527 (1981). Notably, the rule prohibiting interlocutory appeals prevents the “delay and expense from fragmentary appeals” and “expedite[s] the administration of justice.” *See Berger v. Berger*, 67 N.C. App. 591, 595, 313 S.E.2d 825, 828, (citing *Shaver*, 54 N.C. App. at 486, 283 S.E.2d at 526), *disc. review denied*, 311 N.C. 303, 317 S.E.2d 678 (1984).

Here, the Commission reserved both the issue of the extent of Mr. Thomas’s temporary disability, if any, after 13 November 2008 and the issue of his permanent partial disability for future resolution. Its Opinion and Award with respect to causation and temporary total disability compensation from October 2007 until November 2008 was clearly interlocutory. *See Watts v. Hemlock Homes of Highlands, Inc.*, 160 N.C. App. 81, 84, 584 S.E.2d 97, 99 (2003) (holding that where

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the Commission's Opinion and Award had yet to determine the total amount of compensation and there was nothing in the record to indicate that the parties had resolved this issue independently since the Commission entered its Opinion and Award that the appeal was clearly interlocutory).

While we certainly agree with the parties' argument that immediate review of an interlocutory decision is appropriate where the decision affects a substantial right, *Cash*, 181 N.C. App. at 263, 639 S.E.2d at 13, we discern no substantial right of defendants which will be lost if not reviewed before a final Opinion and Award by the Commission. "Our cases have established a two-part test for determining whether an interlocutory order affects a substantial right. First, the right itself must be substantial . . . . Second, the deprivation of that substantial right must potentially work injury if not corrected before appeal from a final judgment." *Perry v. N.C. Dept. of Corr.*, 176 N.C. App. 123, 129, 625 S.E.2d 790, 794 (2006) (citing *Ward v. Wake Cty. Bd. of Educ.*, 166 N.C. App. 726, 729-30, 603 S.E.2d 896, 899 (2004), *disc. review denied*, 359 N.C. 326, 611 S.E.2d 853 (2005)).

The parties cite to *Estate of Harvey v. Kore-Kut, Inc.*, 180 N.C. App. 195, 198, 636 S.E.2d 210, 212 (2006) in support of their contention that a substantial right is at issue in this appeal. We conclude *Harvey* is inapposite. In *Harvey* we held "[w]here the dismissal of an appeal as interlocutory could result in two different trials on the same issues, creating the possibility of inconsistent verdicts, a substantial right is prejudiced[.]". No such possibility exists here; the Commission has determined that Mr. Thomas's injury occurred by "accident," and has reserved for later determination issues relating to the extent and duration of his disability and compensation. If, after those issues are resolved, defendants are successful in their appeal of the Commission's determination that the injury was caused by "accident," then Mr. Thomas will not be entitled to any recovery. See *Berger*, 67 N.C. App. at 595, 313 S.E.2d at 828 ("Any error in the order not affecting a substantial right is correctable upon appeal from the final judgment"); *Perry*, 176 N.C. App. at 130, 625 S.E.2d at 795 ("When the sole issue is the payment of money pending the litigation, we see no reason why a different result [from earlier cases holding that there was not a substantial right at issue] should occur in workers' compensation cases."). If defendants' appeal is not successful, the Commission's Order and Award will stand.<sup>1</sup>

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1. N.C.G.S. § 97-18, which governs the timing of payment of indemnity compensation awarded to a plaintiff by the Commission, states that "[t]he first installment of

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In conclusion, we believe that if we were to accept Mr. Thomas's invitation to review this case in the manner in which he suggests, we would act contrary to long-established precedent and throw open the appellate process to almost limitless fragmentary appeals. Therefore, the appeal is dismissed.

Appeal dismissed.

Judges STROUD and STEPHENS concur.

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compensation payable under the terms of an award by the Commission . . . shall become due 10 days from the day *following expiration of the time for appeal from the award[.]*" N.C. Gen. Stat. § 97-18(e) (2009) (emphasis added). Since the present award is interlocutory and, thus, not appealable at this time, it can only be reasoned that the "time for appeal from this award" has not expired. Therefore, any disability compensation potentially owing to plaintiff under the award is not now due, nor shall it come due upon dismissal of this appeal.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 JANUARY 2011)

ARROW FIN. SERVS., LLC v. NICKELS No. 10-625	Guilford (09CVD6963)	Dismissed
AZALEA GARDEN BD. v. VANHOY No. 09-1119	Davidson (06CVS948)	Affirmed
BRINN v. WEYERHAEUSER CO. No. 09-1671	Indus. Comm. (821807)	Affirmed
CONOLEY v. TOWN OF WENDELL No. 09-810	Wake (07CVS18055)	Affirmed
FIRST MOUNT VERNON INDUS. LOAN ASS'N v. PRODEV XXII, LLC No. 10-199	Craven (08CVS797)	Affirmed in part; dismissed in part
HARRELL v. GEN. ELEC. No. 10-358	Indus. Comm. (529102)	Affirmed
HYMAN v. N.C. DEPT' OF ENVTL. & NATURAL RES. No. 10-211	Indus. Comm. (806721)	Affirmed
IN RE HASTY No. 10-298	Property Tax Comm. (08PTC276)	Affirmed
IN RE V.M.F. No. 10-1028	Transylvania (09JA16-17)	Affirmed in part; reversed and remanded in part
POWELL v. CITY OF RALEIGH No. 10-563	Indus. Comm. (779960)	Affirmed in part and remanded

## IN THE COURT OF APPEALS

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RAPRAGER v. RAPRAGER No. 10-289	Granville (08CVD128)	Affirmed
RUMPLE v. DELELLIS No. 10-659	Cabarrus (08CVS3597)	Dismissed
STATE v. AIKENS No. 10-350	New Hanover (08CRS63263)	No Error
STATE v. ALSTON No. 10-598	Guilford (07CRS88666)	No Error
STATE v. ANTHONY No. 10-744	Forsyth (09CRS24553)	Affirmed
STATE v. BROWN No. 10-419	Mecklenburg (08CRS206078-82) (07CRS34028)	No Error
STATE v. BUTLER No. 10-664	Johnston (08CRS8554) (09CRS3437-40)	Affirmed
STATE v. BYRD No. 10-637	Harnett (07CRS53708)	Remanded for resentencing
STATE v. CHAPPELLE No. 09-1076	Pasquotank (06CRS51435)	Reversed and Remanded
STATE v. CORNELISON No. 10-387	Guilford (02CRS69591) (01CRS92384) (02CRS69556) (02CRS69609) (02CRS69522) (02CRS69573) (01CRS91808) (02CRS69626) (02CRS69539)	Affirmed

STATE v. EDWARDS No. 10-644	Lenoir (08CRS50828) (09CRS1480) (08CRS52049) (08CRS2682)	Remanded
STATE v. EVANS No. 10-511	Durham (05CRS51484)	No Error
STATE v. GAY No. 10-635	Alamance (08CRS55894) (08CRS12867) (05CRS23596) (08CRS57282)	Affirmed
STATE v. HARPER No. 10-578	Edgecombe (08CRS50298)	Affirmed
STATE v. HOBBS No. 10-413	Lenoir (09CRS2336-2338)	Reversed and Remanded
STATE v. HUBBARD No. 10-449	Halifax (06CRS54236) (06CRS54248)	Affirmed
STATE v. HUYNH No. 10-520	Wake (08CRS68126)	No Error
STATE v. JACOBS No. 10-416	Sampson (07CRS51724)	Dismissed
STATE v. JONES No. 10-420	Guilford (09CRS75792)	No Error
STATE v. KING No. 10-617	Randolph (08CRS53350)	No prejudicial error; remanded for correction of the clerical error
STATE v. LITTLE No. 10-573	Durham (09CRS40894)	Dismissed
STATE v. LOWE No. 10-532	Onslow (06CRS60855)	No error; remanded for correction of clerical error

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STATE v. MUHAMMAD No. 10-434	Guilford (07CRS95539)	No Error
STATE v. ODUESO No. 10-567	Mecklenburg (05CRS231303)	No Error
STATE v. PARKER No. 10-731	Rockingham (09CRS2744) (09CRS50045-46) (09CRS50880)	No Error
STATE v. PEARSON No. 10-229	Gaston (07CRS64643) (07CRS13860)	No Error
STATE v. RHODES No. 10-784	Rockingham (08CRS50735)	No Error
STATE v. ROSS No. 10-391	Buncombe (06CRS44) (05CRS63649)	No error in part, vacated and remanded in part
STATE v. ROSS No. 10-354	Cleveland (08CRS3582) (08CRS738)	No Error
STATE v. SANTAMARIA No. 10-239	Wake (08CRS20548-49)	No Error
STATE v. SHOGAR No. 10-661	Guilford (07CRS89147)	No prejudicial error in part; dismissed without prejudice in part
STATE v. SMITH No. 10-517	Orange (07CRS55136)	No Error
STATE v. WALL No. 10-761	Richmond (09CRS52981-83)	Accordingly, we hold no error
STATE v. WATLINGTON No. 10-531	Guilford (08CRS102734) (08CRS24938) (08CRS102732)	No Error

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**TOWN OF MIDLAND v. MORRIS**

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TOWN OF MIDLAND, PLAINTIFF v. HARRY T. MORRIS AND MARALYN R. MORRIS,  
DEFENDANTS

AND

TOWN OF MIDLAND, PLAINTIFF v. JOHN S[.] WAGNER AND ANNE D. WAGNER,  
DEFENDANTS

AND

TOWN OF MIDLAND, PLAINTIFF v. BEVERLY F. CHAPMAN, DEFENDANT

AND

TOWN OF MIDLAND, PLAINTIFF v. BRENDA SEAFORD, HAROLD GRAY SEAFORD &  
BEN F. FISHER, DEFENDANTS

AND

TOWN OF MIDLAND, PLAINTIFF v. JIMMY RAY WILKINSON AND GILDA S[.]  
WILKINSON, DEFENDANTS

AND

TOWN OF MIDLAND, PLAINTIFF v. VAUDREY MESIMER AND EDITH MESIMER,  
DEFENDANTS

AND

TOWN OF MIDLAND, PLAINTIFF v. DOROTHY DRESCHER BLACK, DEFENDANT

AND

TOWN OF MIDLAND, PLAINTIFF v. MARLENE T[ ] COOK AND JENNINGS R. COOK,  
DEFENDANTS

AND

TOWN OF MIDLAND, PLAINTIFF v. ALBERTINE L. SMITH, DEFENDANT

AND

TOWN OF MIDLAND, PLAINTIFF v. WILMER MELTON, JR. AND HARRIET L.  
MELTON, DEFENDANTS

AND

TOWN OF MIDLAND, PLAINTIFF v. WILMER MELTON, JR. AND HARRIET L.  
MELTON, DEFENDANTS

AND

TOWN OF MIDLAND, PLAINTIFF v. BILLY JAMES, NORRIS JAMES AND  
AMELIA GOODNIGHT, DEFENDANTS

AND

TOWN OF MIDLAND, PLAINTIFF v. CONCORD POLICE CLUB, INC., DEFENDANT

AND

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**TOWN OF MIDLAND v. MORRIS**

[209 N.C. App. 208 (2011)]

TOWN OF MIDLAND, PLAINTIFF v. THERON KEITH HONEYCUTT AND ANN NASH  
HONEYCUTT, DEFENDANTS

AND

TOWN OF MIDLAND, PLAINTIFF v. THERON KEITH HONEYCUTT AND ANN NASH  
HONEYCUTT, DEFENDANTS

AND

HARRY T.[ ] MORRIS AND MARALYN R. MORRIS, PLAINTIFFS v. TOWN OF  
MIDLAND, DEFENDANT

AND

JIMMY RAY WILKINSON AND GILDA S. WILKINSON, PLAINTIFFS v.  
TOWN OF MIDLAND, DEFENDANT

AND

VAUDREY MESI[M]ER AND EDITH MESI[M]ER, PLAINTIFFS v.  
TOWN OF MIDLAND, DEFENDANT

AND

MARLENE T. COOK AND JENNINGS R. COOK, PLAINTIFFS v.  
TOWN OF MIDLAND, DEFENDANT

AND

ALBERTINE L. SMITH, TRUSTEE, PLAINTIFF v. TOWN OF MIDLAND, DEFENDANT

AND

BILLY JAMES, NORRIS JAMES AND AMELIA GOODNIGHT, PLAINTIFFS v.  
TOWN OF MIDLAND, DEFENDANT

AND

DOROTHY DRESCHER BLACK, PLAINTIFF v. TOWN OF MIDLAND, DEFENDANT

AND

CONCORD POLICE CLUB, INC., PLAINTIFF v. TOWN OF MIDLAND, DEFENDANT

No. COA10-322

(Filed 18 January 2011)

**1. Appeal and Error—appealability—mootness—eminent domain**

The property owners' appeal in an eminent domain case was not moot even though construction of the pertinent pipeline on their property was complete. If the Court of Appeals found in their favor, property owners would be entitled to relief both in the form of reimbursement for their costs in the action, as well as in the form of return of title to the land.

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**2. Evidence— judicial notice—Utilities Commission order—public documents**

Plaintiff town's motion to take judicial notice of a Utilities Commission order allowing joint motion for approval of settlement and abandonment of service was granted because it was an important public document. However, its motion to take judicial notice of actions of Piedmont Natural Gas, Monroe, and Mooresville were declined.

**3. Eminent Domain— condemnation—creation of gas transmission and distribution system—public use test—public benefit test—standing**

The trial court did not err by granting summary judgment in favor of plaintiff town based on its conclusion that the town lawfully exercised its eminent domain power. The town may acquire property by condemnation to establish a gas transmission and distribution system, even in the absence of a concrete, immediate plan to furnish gas service to its citizens. The condemnation passed the public use and public benefit tests. Property owners did not have standing to assert N.C.G.S. § 153-15 as a defense to the condemnations. Further, the Cabarrus County Voluntary Agriculture District did not bar the town's exercise of its condemnation power. Finally, condemnor was not required to specifically state each and every intended use of the property.

Appeal by Property Owners<sup>1</sup> from order entered 13 November 2009 by Judge Lindsay R. Davis, Jr. in Cabarrus County Superior Court. Heard in the Court of Appeals 16 September 2010.

*Styers & Kemerait, PLLC, by M. Gray Styers, Jr., and Hartsell & Williams, P.A., by Fletcher Hartsell and Michael Burgner, for Midland-Appellee.*

*Hamilton Moon Stephens Steele & Martin, PLLC, by Keith J. Merritt and Rebecca K. Cheney, for all Property Owner-Appellants except Property Owner-Appellant Wagner.*

*Ferguson, Scarbrough, Hayes, Hawkins, & DeMay, P.A., by James E. Scarbrough, for Property Owner-Appellant Wagner.*

STEPHENS, Judge.

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1. This Court granted motions to dismiss the appeal in the actions numbered 08 CVS 4738, 09 CVS 525, 08 CVS 4070, 09 CVS 1978, and 09 CVS 1979. Further, 08 CVS 4069 was dismissed by this Court following a motion to withdraw appeal filed in that action.

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[209 N.C. App. 208 (2011)]

*Facts*

The Transcontinental Pipeline transports and distributes natural gas from the Gulf of Mexico to the northeastern United States. In April 2002, the City of Monroe, North Carolina, decided to supply the citizens of Monroe and the surrounding area with natural gas by a direct connection between its natural gas distribution system and the Transcontinental Pipeline. To directly connect to the Transcontinental Pipeline, Monroe needed to acquire the rights to property through which to run a pipeline along the forty-two miles between Monroe and the direct connection on the Transcontinental Pipeline located in Iredell County.

To facilitate the acquisition of land for the construction of the new pipeline (“Pipeline”), Monroe, located in Union County, entered into interlocal agreements with the Town of Mooresville, located in Iredell County, and the Town of Midland, located in Cabarrus County.

The relevant terms of the interlocal agreement between Midland and Monroe (“Interlocal Agreement”) provide as follows:

4. Midland shall be responsible for obtaining either by acquisition or by the power of eminent domain and holding in its name for the benefit of the parties and this Interlocal Agreement all easements (both permanent and temporary construction), rights of way, and real property required for the project in Cabarrus County.

....
10. . . . Midland shall grant Monroe a perpetual, non-exclusive right to use easements acquired pursuant to this agreement in Cabarrus County for continued location and operation of a natural gas pipeline and other public utilities so long as said utilities do not conflict with any Midland public utilities.

....
20. . . . Midland shall retain a perpetual right to locate and install one (1) tap in the pipeline within the corporate limits of Midland from which to operate and supply its own natural gas distribution utility for the benefit of Midland’s utility customers in Cabarrus County only. The one tap for Midland’s use shall be subject to a right of first refusal granted to a private natural gas provider to serve customers that would otherwise be served by Midland . . . .

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21. During the term of this Agreement, Midland is hereby granted a maximum daily quantity of up to 5,000 decatherms per day capacity from the pipeline without demand or transportation fees, and Monroe shall retain the remaining capacity available for its own use.

....

26. . . . Upon termination of this Agreement, it is understood and expressly agree[d] that Monroe shall retain a non-exclusive, perpetual easement over and across any easements or right of way acquired in Cabarrus County pursuant to this agreement and on which is located the pipeline which is the subject matter of this Agreement.

Midland, Monroe, and Mooresville also entered into a Joint Venture Agreement with Public Service Company of North Carolina (“PSNC”). The relevant portions of this agreement provide as follows:

**A. Rights-of-Way.**

....

5. Midland and Mooresville each hereby agree to execute and deliver to PSNC prior to the Closing an Assignment . . . assigning to PSNC a non-exclusive right, title, and interest in and to all easements for the [Pipeline].

....

**B. Tap Rights.**

1. **Midland.** Pursuant to the second amendment to the Interlocal Agreement between Midland and Monroe, Midland shall have the right to locate and install one (1) service tap from the Pipeline to serve customers located within the corporate limits of Midland as of December 4, 2008; provided that PSNC has first elected not to serve each such customer pursuant to its North Carolina Utilities Commission approved rate schedules and service regulations.

In 2008 Midland began the process of acquiring the property necessary for the construction of the Pipeline. When negotiations for voluntary acquisitions for the rights of way failed, Midland exercised its eminent domain authority to condemn the needed property.

The present controversy stems from fifteen condemnation actions filed by the Town of Midland in Cabarrus County Superior Court. In those fifteen actions, the opposing parties (hereinafter

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“Property Owners”) filed defenses and counterclaims, challenging Midland’s power to condemn the properties in question; several Property Owners also filed separate claims against Midland for injunctive relief.

The many actions were consolidated for purposes of hearing dispositive motions involving the ability of Midland to condemn the properties. In each case, the dispositive motions were identified as motions for preliminary injunction, motions to dismiss, motions for summary judgment, or motions for a determination of all issues other than damages pursuant to N.C. Gen. Stat. § 40A-47. In the Superior Court of Cabarrus County, the Honorable Lindsay R. Davis presiding, the trial court ruled in favor of Midland, finding that Midland had the right to condemn the property, denying the Property Owners’ motions for injunctive relief and motions to dismiss, and entering summary judgment in favor of Midland in the actions. From the trial court’s order granting summary judgment for Midland, the Property Owners appeal.

*Discussion**I. Mootness and Appellate Review*

[1] Midland argues that Property Owners’ appeal is moot because construction of the Pipeline is complete. In support of this argument, Midland cites this Court’s decision in *Total Renal Care of North Carolina LLC v. North Carolina Dept. of Health and Human Servs. Div. of Health Serv. Regulation, Certificate of Need Section*, 195 N.C. App. 378, 673 S.E.2d 137 (2009). In our decision in *Total Renal Care*, which was based on a certificate of need statute that is entirely inapplicable to this case (and that has since been amended), this Court held that because the statute afforded the plaintiff no relief, even if the Court were to find in its favor, the appeal was moot.<sup>2</sup>

In this case, however, if this Court finds in their favor, Property Owners will be entitled to relief both in the form of reimbursement for their costs in the action, as well as in the form of return of title to

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2. In *Total Renal Care*, petitioner appealed the decision by the Department of Health and Human Services (“DHHS”) to issue a certificate of need (“CON”) to respondent healthcare provider and respondent-intervenor developer. 195 N.C. App. 378, 673 S.E.2d 137. While the appeal was pending, respondent-intervenor developer completed, and respondent healthcare provider began operating, the kidney disease treatment center. *Id.* On appeal, this Court found that the appeal was moot because, pursuant to the statute governing withdrawal of a CON, DHHS was not authorized to withdraw a CON after the project or facility for which the CON was issued was completed and became operational. *Id.*

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the land. *See* N.C. Gen. Stat. § 40A-8(b) (2009) (stating that if final judgment is that the condemnor is not authorized to condemn the property, the court with jurisdiction over the action shall award each owner of the property a sum that will reimburse the owner for his costs in defending the action); *see also* N.C. Gen. Stat. § 40A-1 (2009) (stating that “it is the intent of the General Assembly that . . . the uses set out in G.S. 40A-3 are the exclusive uses for which the authority to exercise the power of eminent domain is granted”); *see, e.g.*, *State Highway Comm'n v. Thornton*, 271 N.C. 227, 241, 156 S.E.2d 248, 259 (1967) (holding that “[i]t is clear that private property can be taken by exercise of the power of eminent domain only where the taking is for a public use” and that “[t]o take [one’s] property without his consent for a non-public use, even though he be paid its full value, is a violation of Article I, § 17, of the Constitution of [North Carolina] and of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States”). We are wholly unpersuaded by Midland’s argument that, even where a city flagrantly violates the statutes governing eminent domain, that city can obtain permanent title to the land by fulfilling the purpose of a condemnation before final judgment on the validity of condemnation is rendered. Accordingly, we hold that this appeal is not moot and we address the merits of Property Owners’ appeal.

*II. Judicial Notice*

[2] Midland has asked this court to take judicial notice of (1) actions of Piedmont Natural Gas, Monroe, and Mooresville regarding the cessation of certain gas service to Monroe and Mooresville and those two cities’ alleged natural gas needs, and (2) an Order by the North Carolina Utilities Commission (“Utilities Commission”) approving a modification of the Joint Venture Agreement.

Regarding the Order of the Utilities Commission, our Supreme Court has stated that important public documents such as an order of the Utilities Commission will be judicially noticed. *State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co.*, 289 N.C. 286, 288, 221 S.E.2d 322, 323-24 (1976); *see also State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Admin. Office*, 293 N.C. 365, 381, 239 S.E.2d 48, 58 (1977) (taking judicial notice of the North Carolina Rate Bureau’s filing with the Commissioner of Insurance). Accordingly, we grant Midland’s motion to take judicial notice of the Utilities Commission’s Order Allowing Joint Motion for Approval of Settlement and Abandonment of Service, North Carolina Utilities Commission, Docket Nos. G-5, Sub 508, G-23, Sub 2, G-5, Sub 510, issued 18 May 2010.

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As for Midland's motion to take judicial notice of actions of Piedmont Natural Gas, Monroe and Mooresville, we decline this invitation as the "uncontested facts" offered by Midland are irrelevant in our determination of the issues of this case. The fact that Monroe and Mooresville may soon have a need for the natural gas flowing through the Pipeline has no effect on the validity of Midland's condemnations. If this case is decided in Property Owners' favor, they will be entitled to relief regardless of the natural gas needs of Monroe and Mooresville.

*III. Validity of the Midland Condemnations*

[3] On appeal, Property Owners argue that Midland's condemnations violated the applicable statutes such that the trial court's grant of summary judgment was error. As our Supreme Court has previously held, a *de novo* standard of review is appropriate for reviewing decisions on all issues other than damages in an eminent domain case. *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001), *cert. denied*, 535 U.S. 971, 152 L. Ed. 2d 381 (2002). Specifically, Property Owners raise several arguments challenging the right of Midland to acquire the property by exercise of its eminent domain power. We address each of these arguments separately below.

*A. Midland's lack of a plan to furnish gas services*

Property Owners first argue that because Midland neither currently provides natural gas services to its citizens, nor currently has any plans to provide natural gas to its citizens in the future, the condemnations were undertaken in violation of the statutes governing eminent domain. We disagree.

Under N.C. Gen. Stat. § 160A-240.1, a city may, by any method including condemnation, acquire any property "for use by the city." N.C. Gen. Stat. § 160A-240.1 (2009). This use by the city must be an authorized use. *See Porsh Builders, Inc. v. City of Winston Salem*, 302 N.C. 550, 276 S.E.2d 443 (1981) (holding that a city may only exercise those powers granted by statute or charter). As applicable in this case, N.C. Gen. Stat. § 160A-312 authorizes a city to establish a public enterprise—including a gas transmission and distribution system—to "furnish services to the city and its citizens." N.C. Gen. Stat. §§ 160A-311(4), 160A-312(a) (2009). Further, a city may establish such an enterprise outside its corporate limits within reasonable limitations. N.C. Gen. Stat. § 160A-312.

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In this case, Midland is acquiring through condemnation property located in Cabarrus County, but beyond the Midland corporate limits, to establish a gas transmission and distribution system, *i.e.*, the Pipeline. Under the terms of the Interlocal Agreement, Midland controls a tap on the Pipeline and is entitled to 5000 decatherms of natural gas per day at a discounted cost.

Property Owners argue that, regardless of Midland's entitlement to discounted natural gas and a tap on the Pipeline, Midland's lack of plans to ever furnish gas services to the city and its citizens shows that Midland is not condemning the property for any actual use by the city and that the condemnations are therefore unlawful. Midland counters that the mere potential to distribute low-cost natural gas to its citizens constitutes sufficient "use" by the city. Accordingly, the determinative issue is whether something more than mere availability or potential is required by the statutes.

Our resolution of this issue necessarily hinges on the breadth of our interpretation of section 160A-312: a narrow reading limits a city's power to establish a public utility to only those situations where the city has a concrete plan to furnish services; a broad reading grants a city power to establish a public utility where the city has a plan to develop the infrastructure and capability, but no immediate plan to actually furnish the services. Based on the following excerpt from N.C. Gen. Stat. § 160A-4, we must conclude that a broad interpretation of section 160A-312 is required:

It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of [Chapter 160A] and of city charters *shall be broadly construed . . .*

N.C. Gen. Stat. § 160A-4 (2009) (emphasis added).

Furthermore, this Court has previously interpreted section 160A-312 to grant cities extensive power to establish and operate public enterprises:

By the broad language the Legislature has used in G.S. § 160A-312 . . . it has evidenced its intent to give cities []comprehensive authority to own and operate public enterprises outside their boundaries with respect to the service of themselves and their citizens. We have construed the broad language of G.S. § 160A-312 as granting a city the absolute authority, without limitation or

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restriction, to establish and conduct a public enterprise for itself and its citizens.

*Davidson County v. City of High Point*, 85 N.C. App. 26, 41, 354 S.E.2d 280, 288 (1987) (citations omitted), *modified and aff'd*, 321 N.C. 252, 362 S.E.2d 553 (1987).

Consistent with the broad mandates of sections 160A-4 and 160A-312, we find it manifest that Midland may acquire property by condemnation to establish a gas transmission and distribution system, even in the absence of a concrete, immediate plan to furnish gas services to its citizens.

While we acknowledge the existence of the requirement that the public enterprise be established and conducted for the city and its citizens, we conclude that this requirement is satisfied by Midland's placement of a tap on the Pipeline and by Midland's acquisition of the right to low-cost natural gas. Further, although one spokesman for Midland professes a lack of any current plan to offer gas to its citizens, there is nothing in the record to indicate that Midland will never offer natural gas services to its citizens. In fact, Midland's contracted-for right to install a tap on the Pipeline "from which to operate and supply its own natural gas distribution utility for the benefit of Midland's utility customers" indicates just the opposite: that Midland will, eventually, furnish natural gas services to its citizens.<sup>3</sup>

Based on the foregoing, we conclude that Midland's acquisition by condemnation of the property for the Pipeline is for use by the city such that section 160A-240.1 is satisfied. Property Owners' argument is overruled.

*B. No public use or benefit*

Property Owners further argue that Midland's condemnations violate N.C. Gen. Stat. § 40A-3(b) because the condemnations are not "for the public use or benefit."

As discussed *supra*, under section 160A-240.1, a city may acquire real property for use by the city by any lawful method, including

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3. Property Owners also argue that Midland itself will never furnish services based on PSNC's right of first refusal to serve any Midland customers. However, as section 160A-312 authorizes a city to establish, as well as contract for the operation of, public enterprises, that PSNC may ultimately provide the service from Midland's tap does not negate the fact that Midland's condemnations are for the purpose of furnishing the citizens of Midland with natural gas services. As for the effect of this right of first refusal on the issue of whether these condemnations are for a public or private purpose, see Discussion section III, C, *infra*.

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condemnation. N.C. Gen. Stat. § 160A-240.1. However, “[i]n exercising the power of eminent domain a city shall use the procedures of Chapter 40A.” *Id.*

N.C. Gen. Stat. § 40A-3, which governs the exercise of the eminent domain power by a municipality, provides as follows:

For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property, either inside or outside its boundaries, for the following purposes.

. . . .

(2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities . . . .

N.C. Gen. Stat. § 40A-3(b) (2009). The list of public enterprises in section 160A-311 includes gas transmission and distribution systems. N.C. Gen. Stat. § 160A-311(4).

It is clear from the statutory language that establishing a gas transmission and distribution system is an appropriate purpose for the condemnation of property under section 40A-3(b). N.C. Gen. Stat. § 40A-3(b); *see also Transcontinental Gas Pipe Line Corp. v. Calco Enters.*, 132 N.C. App. 237, 511 S.E.2d 671, *disc. review denied and appeal dismissed*, 351 N.C. 121, 540 S.E.2d 751 (1999). Accordingly, the issue under section 40A-3(b) is whether Midland’s condemnations are “[f]or the public use or benefit.”

Despite the disjunctive language of this statutory requirement, our Courts have determined the propriety of a condemnation under section 40A-3 based on the condemnation’s satisfaction of both a “public use test” and a “public benefit test.” *See Carolina Tel. & Tel. Co. v. McLeod*, 321 N.C. 426, 430, 364 S.E.2d 399, 401 (1988); *Stout v. City of Durham*, 121 N.C. App. 716, 718, 468 S.E.2d 254, 257, *review allowed*, 344 N.C. 637, 477 S.E.2d 54 (1996), *review withdrawn*, 345 N.C. 353, 484 S.E.2d 93 (1997).

The first approach—the public use test—asks whether the public has a right to a definite use of the condemned property. The second approach—the public benefit test—asks whether some benefit accrues to the public as a result of the desired condemnation.

*Carolina Tel. & Tel. Co.*, 321 N.C. at 430, 364 S.E.2d at 401.

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Under the public use test, “the principal and dispositive determination is whether the general public has a right to a definite use of the property sought to be condemned.” *Id.* This test is applied by our Courts in the context of whether the general public, as opposed to a small group of persons or a single person or entity, has the right to use the property. *See id.; Thornton*, 271 N.C. 227, 156 S.E.2d 248; *City of Charlotte v. Heath*, 226 N.C. 750, 40 S.E.2d 600 (1946); *Stout*, 121 N.C. App. at 718, 468 S.E.2d at 257. Applying this test to the present case in the appropriate context, there is nothing to indicate that gas services—were they to be provided by Midland—would be available to anything less than the entire population. Accordingly, there can be no doubt that the Midland condemnations would pass the public use test because the right to use is granted “in common, not to particular individuals or estates.” *Carolina Tel. & Tel. Co.*, 321 N.C. at 430, 364 S.E.2d at 401 (quoting *Heath*, 226 N.C. at 756, 40 S.E.2d at 605).

However, Property Owners argue that the public use test should be applied in this case to prohibit the Midland condemnations because the citizens of Midland have no right to a definite use of the Pipeline based on the fact that “Midland may never tap into the [P]ipeline.” We are not persuaded by Property Owners’ argument. As noted *supra*, Property Owners’ assertion that Midland may never tap into the pipeline—supported by the Mayor of Midland’s affidavit professing to have no plans to furnish gas service to Midland—is belied by the fact that Midland contracted for control of a tap capable of servicing the citizens of Midland. Although the Midland citizens’ right to a definite use of the Pipeline is contingent upon Midland offering the services, that right is not barred by the fact that the current municipal administration has no plans to furnish services; the *probability* of the exercise of the right to use should not be conflated with the *inability* to exercise that right. Accordingly, we conclude that the citizens of Midland do have a right to a definite use of the Pipeline such that the condemnations satisfy the public use test.

Under the public benefit test, “a given condemnor’s desired use of the condemned property in question is for ‘the public use or benefit’ if that use would contribute to the general welfare and prosperity of the public at large.” *Carolina Tel. & Tel. Co.*, 321 N.C. at 432, 364 S.E.2d at 402. In this case, we must take care in defining Midland’s “desired use” of the property. Midland is condemning the property to run the Pipeline and to control a tap on the Pipeline, not to immediately provide gas to the citizens of Midland. Accordingly, it is the *availability*

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of natural gas that must contribute to the general welfare and prosperity of the public at large.

As noted by our Courts, the construction and extension of public utilities, and especially the concomitant commercial and residential growth, provide a clear public benefit to local citizens. *See State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 337 N.C. 236, 239-41, 446 S.E.2d 348, 350-51 (1994) (upholding the Utilities Commission's findings that "[t]he availability of natural gas service is an important factor in industrial recruitment" and that expansion of natural gas facilities into unserved areas "will assist in the economic development of unserved areas"); *Stout*, 121 N.C. App. at 719, 468 S.E.2d at 257 (noting that "the paramount public interest served by construction of the [utility] is the continued residential and commercial growth which it enables"). Likewise, in this case, Midland's tap on the Pipeline, and its potential to provide natural gas service, likely will spur growth, as well as provide Midland with an advantage in industrial recruitment. These opportunities must be seen as public benefits accruing to the citizens of Midland, such that Midland's condemnations are for the public benefit.

Further, as noted by Midland, N.C. Gen. Stat. § 62-2 makes the following declaration with respect to this issue:

(a) Upon investigation, it has been determined that the rates, services and operations of public utilities as defined herein, are affected with the public interest and that the availability of an adequate and reliable supply of electric power and natural gas to the people, economy and government of North Carolina is a matter of public policy. It is hereby declared to be the policy of the State of North Carolina:

....

(9) To facilitate the construction of facilities in and the extension of natural gas service to unserved areas in order to promote the public welfare throughout the State

....

N.C. Gen. Stat. § 62-2(a)(9) (2009).

The clear language of the statute indicates that, as a matter of North Carolina policy, *facilitation* of the extension of natural gas service to unserved areas—and not simply the extension itself—promotes the public welfare. *Id.* A tap on the Pipeline that is

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controlled by Midland facilitates extension of natural gas service to the unserved citizens of Midland.

Based on the foregoing, we conclude that the condemnations by Midland were for the public benefit or use such that the condemnations do not violate section 40A-3(b). Accordingly, Property Owners' argument is overruled.

*C. Condemnations are for a private purpose*

Property Owners next argue that because Midland has agreed to assign to PSNC "a non-exclusive right, title and interest in and to" all Pipeline easements, and because, pursuant to the Joint Venture Agreement, PSNC is a 25% owner of the Pipeline, the condemnations are for a private purpose and, consequently, they are unlawful under North Carolina law.

Regarding this issue, Midland has asked this Court to take judicial notice of an amendment to the Joint Venture Agreement. As discussed *supra*, because this amendment has been memorialized in an order of the Utilities Commission, we will take judicial notice of the amendment.

As noted in the Utilities Commission report, the amendment to the Joint Venture agreement will "eliminate PSNC's ownership interest in the [] Pipeline" and will "provide that the [P]ipeline will be a purely municipal enterprise[.]". Accordingly, Property Owners' argument with respect to PSNC's ownership is overruled.

As for Property Owners' argument that PSNC's easement rights make the condemnations solely for a private purpose, this Court has held that where the taking benefits both public and private interests, the controlling question is "whether the paramount reason for the taking of land to which objection is made is the public interest, to which benefits to private interests are merely incidental, or whether, on the other hand, the private interests are paramount and controlling and the public interests merely incidental." *Stout*, 121 N.C. App. at 719, 468 S.E.2d at 257 (quoting *Carolina Tel. & Tel. Co.*, 321 N.C. at 434, 364 S.E.2d at 403).

Applying this test in *Stout*, we held that condemning property to extend a sewer system to accommodate a private developer of a shopping mall was in the public, rather than private, interest because "[t]hough [the private] development may have hastened the need for expanded sewer services in the vicinity, the paramount public interest

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served by construction of the [sewer] outfall is the continued residential and commercial growth which it enables.” 121 N.C. App. at 719, 468 S.E.2d at 257. Similarly, in *Carolina Tel. & Tel. Co.*, a case in which plaintiff telephone company was condemning the property to provide service to only one customer, our Supreme Court upheld the plaintiff telephone company’s condemnation, noting that the provision of telephone service to one customer was “a small part of a more important and more far-reaching effort—the effort to ensure that, in an era in which the telephone has truly become a necessity, whole communities, as well as members of individual communities, are interconnected by telephone systems.” 321 N.C. at 433, 364 S.E.2d at 403.

Unlike in the cases above, where the condemnation was initially undertaken to accommodate one private party—a private shopping center developer and a private landowner—but where the corresponding public benefits clearly overshadowed that private benefit, in this case the condemnations were undertaken to facilitate the extension of natural gas services to all of the citizens of Midland, and there is nothing to indicate that the condemnations were undertaken solely to accommodate PSNC’s efforts to serve its current or future customers. Furthermore, as discussed *supra*, this extension of services to Midland’s citizens carries with it the corresponding public benefits of growth and industrial recruitment. The fact that PSNC, along with Monroe, is granted an easement on the Pipeline cannot overshadow the public benefits accruing to the citizens of Midland. Accordingly, PSNC’s “non-exclusive right, title, and interest in and to all easements” for the Pipeline in Cabarrus County must be seen as incidental to the paramount public interest served by the establishment of a gas transmission and distribution system.

We further note that the existence of PSNC’s right of first refusal to serve Midland citizens does not affect our conclusion that the condemnation is lawful. Firstly, section 160A-312(a) grants Midland the authority to “contract for the operation of any or all of the public enterprises[.]” N.C. Gen. Stat. § 160A-312(a). As such, Midland is not required to operate the gas distribution system itself, and may lawfully contract with PSNC to provide services to its citizens. Secondly, Midland’s control of the tap on the Pipeline will allow Midland to provide natural gas services to its citizens regardless of whether PSNC exercises its right of first refusal, effectively guaranteeing that natural gas service will be available to the citizens of Midland.

Accordingly, we conclude that the Midland condemnations were not undertaken to provide a solely private benefit.

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*D. Violation of N.C. Gen. Stat. § 153A-15*

Property Owners further argue that the condemnations either violate, or are a sham to avoid, N.C. Gen. Stat. § 153A-15 and are therefore unlawful.

Section 153A-15 provides, *inter alia*, that a city seeking to acquire—whether by condemnation, exchange, purchase, or lease—property located in a county other than the county in which the city is located must obtain the consent or approval of the board of commissioners of the county where the land is located. N.C. Gen. Stat. § 153A-15 (2009). As violations of section 153A-15, Property Owners assert (1) that Midland is just a “token title-holder” and Monroe is the actual condemnor and therefore Monroe is acquiring property located in Cabarrus County without the consent of the Cabarrus County Board of Commissioners, and (2) that, by operation of the Interlocal Agreement, Monroe is acquiring real property located in Cabarrus County without the approval of the Cabarrus County Board of Commissioners.

Before we address the merits of Property Owners’ contention, however, we must decide whether Property Owners have standing to assert section 153A-15 as a defense to Midland’s condemnations. Although neither party raised the issue of standing with respect to this argument, we note that “standing is a jurisdictional issue and this Court may raise the question of subject matter jurisdiction on its own motion.” *See Union Grove Milling & Mfg. Co. v. Faw*, 109 N.C. App. 248, 251, 426 S.E.2d 476, 478, *aff’d per curiam*, 335 N.C. 165, 436 S.E.2d 13 (1993) (quoting *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 234 S.E.2d 206, *disc. review denied*, 293 N.C. 159, 236 S.E.2d 704 (1977)); *see also Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 341, 543 S.E.2d 169, 171 (2001) (“[I]ssues pertaining to standing may be raised for the first time on appeal, including *sua sponte* by the Court.”).

Rule 17(a) of the North Carolina Rules of Civil Procedure provides that every claim shall be prosecuted in the name of the real party in interest. N.C. Gen. Stat. § 1A-1, Rule 17 (2009). “This Court has previously stated that the real party in interest is the party who by substantive law has the legal right to enforce the claim in question.” *Union Grove Milling*, 109 N.C. App. 248, 251, 426 S.E.2d 476, 479 (internal quotation marks, bracket, and citation omitted).

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In *County of Johnston v. City of Wilson*, 136 N.C. App. 775, 525 S.E.2d 826 (2000), this Court, interpreting section 153A-15, held that “the County, through its Board of Commissioners, was statutorily granted the *substantive right* to protect its citizens from unlawful takings by contiguous local governments. See N.C.G.S. § 153A-15.” *Id.* at 779, 525 S.E.2d at 829 (emphasis added). The power to exercise this substantive right granted to a county is vested solely in the board of commissioners. See N.C. Gen. Stat. § 153A-12 (2009) (“Except as otherwise directed by law, each power, right, duty, function, privilege and immunity of the [county] shall be exercised by the board of commissioners.”). Accordingly, the real party in interest who by substantive law has the legal right to enforce a claim arising under section 153A-15 is the county affected by a potential section 153A-15 violation and not an individual property owner.

Likewise, it is well settled that an appeal may only be taken by an aggrieved real party in interest. *State Farm Mut. Auto. Ins. Co. v. Ingram, Comm'r of Ins.*, 288 N.C. 381, 218 S.E.2d 364 (1975); *County of Johnston*, 136 N.C. App. 775, 525 S.E.2d 826. “[A] person aggrieved is one adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights.” *County of Johnston*, 136 N.C. App. at 779, 525 S.E.2d at 829 (internal quotation marks omitted). Based on its interpretation of section 153A-15, this Court has previously held that a county has “standing to proceed as an aggrieved real party in interest” where a decision adversely affects that county’s section 153A-15 rights. *Id.*

Although Property Owners clearly have standing to proceed with their appeal as aggrieved real parties in interest based on the adverse effect of the trial court’s ruling on their property rights, it is not so clear that Property Owners are entitled to appeal the ruling based on its adverse effect on the rights granted to a board of county commissioners under section 153A-15; those rights conferring standing to Property Owners are not the same rights conferring standing to a board of county commissioners. Further, it is notable that in the only cases brought before this Court in which section 153A-15 rights are at issue, the party asserting those rights has been a county. See *Caswell County v. Town of Yanceyville*, 170 N.C. App. 124, 611 S.E.2d 451 (2005); *County of Johnston*, 136 N.C. App. 775, 525 S.E.2d 826.

“ ‘Standing typically refers to the question of whether a particular litigant is a proper party to assert a legal position. Standing carries with it the connotation that someone has a right; but, *quaere*, is the

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party before the court the appropriate one to assert the right in question.’” *Higgins v. Simmons*, 324 N.C. 100, 103, 376 S.E.2d 449, 452 (1989) (quoting *State v. Labor and Indus. Review Comm’n*, 136 Wis. 2d 281, 287 n.2, 401 N.W.2d 585, 588 n.2 (1987)). In this case, because section 153A-15 grants substantive rights to an affected county, and not to an individual property owner, the appropriate party to assert the statutory rights granted by section 153A-15 must be an affected county, and not an individual property owner. *See id.* (holding that a party cannot assert a statute as a defense where the statute grants rights personal to other person and not to the party). Therefore, we conclude that Property Owners do not have standing to assert section 153A-15 as a defense to Midland’s condemnations. As such, this Court does not have subject matter jurisdiction to hear the argument. *See Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (“If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.”), *disc. review denied*, 359 N.C. 631, 613 S.E.2d 688 (2005). Accordingly, we must dismiss Property Owner’s section 153A-15 argument.

*E. Failure to follow the procedures for condemnation of property in the Cabarrus County Voluntary Agricultural District*

Property Owners’ argument on this issue affects only those properties owned by Property Owner Albertine L. Smith and Property Owners Vaudrey and Edith Mesimer, which properties are included in the Cabarrus County Voluntary Agricultural District (“VAD”). Property Owners argue that the relevant condemnation proceedings should be dismissed because Midland is attempting to condemn these properties in violation of the Cabarrus County VAD ordinance.

Under N.C. Gen. Stat. § 106-740, a VAD ordinance

may provide that no State or local public agency or governmental unit may formally initiate any action to condemn any interest in qualifying farmland within a voluntary agricultural district under this Part . . . until such agency has requested the local agricultural advisory board established under G.S. 106-739 to hold a public hearing on the proposed condemnation.

N.C. Gen. Stat. § 106-740 (2009) (emphasis added).

The Cabarrus County VAD ordinance contains an “Article X Public Hearings,” which deals with requests for proposed condemnations of property located in a VAD and which states as follows:

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**A. Purpose**

Pursuant to N.C.G.S. § 106-740, which provides that no state or local public agency or governmental unit may formally initiate any action to condemn any interest in qualifying farmland within a District until such agency or unit has requested the Advisory Board to hold a public hearing on the proposed condemnation.

Cabarrus County, NC, Voluntary Agric. Dist. Ordinance, art. X (enacted 2005).

Although section 106-740 permits a VAD ordinance to provide that no condemnation may be initiated until a request for hearing has been made, Article X of the Cabarrus County VAD ordinance has not so provided. The purpose section of Article X states that it is pursuant to section 106-740, which itself states that a VAD ordinance *may* provide for public hearings. However, the introductory clause that serves as the Cabarrus County VAD, Article X purpose “statement” does not actually “provide that no State or local public agency or governmental unit may formally initiate any action to condemn” property in the Cabarrus County VAD without first requesting a hearing. In the absence of language affirmatively exercising the power granted to the Cabarrus County VAD by section 106-740, we must conclude that the Cabarrus County VAD does not serve as a bar to Midland’s exercise of its condemnation power. Accordingly, Property Owners’ argument is overruled.

***F. Use of the condemned property is limited to use as a natural gas pipeline***

By their final argument, Property Owners contend that the purpose of the condemnations, as stated by Midland in its notices of condemnation, was “to construct and operate a natural gas pipeline for the transmission and distribution of natural gas serving the citizens of Midland and Cabarrus County as well as to construct and operate a fiber optic line[.]” Accordingly, Property Owners argue that the easements can only be used for the purposes set forth in the notice and no other purposes. Specifically, Property Owners contend that the easements may only be used to distribute natural gas to citizens of Cabarrus County and may not be used to serve residents outside the county. However, because this Court has previously held that while a condemnor must state the fundamental purpose of the condemnation in the notice, a condemnor “need not specifically state each and every

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intended ‘use’ of the property” in the notice, *Catawba County v. Wyant*, 197 N.C. App. 533, 541, 677 S.E.2d 567, 572 (2009) (quoting *Scotland County v. Johnson*, 131 N.C. App. 765, 769, 509 S.E.2d 213, 215 (1998)), we conclude that the portion of the Pipeline running through the property condemned by Midland may be used to transport natural gas to other persons, as well as to citizens of Midland.

Property Owners further contend that Midland “appears to claim in both the [Interlocal Agreement] and in the Affidavit of [the Midland Mayor], that Midland can use the easements obtained for construction of a natural gas pipeline for any other utility purpose.” Property Owners argue that the construction of any other utility would constitute an additional burden and would require additional compensation. As previously discussed, Midland is not required to state every use for the property, as long as the fundamental purpose of the condemnation is stated. *Id.* However, even if construction of another utility would not be included in the fundamental purpose of constructing the natural gas utility, the fact remains that Midland has properly exercised its power of eminent domain to acquire the property necessary to construct a gas pipeline. Because there is no evidence of any other utility construction by Midland before this Court, we must conclude that any ruling on the issue of additional compensation based on a hypothetical additional burden is premature.

We hold that Midland lawfully exercised its eminent domain power. Therefore, the ruling of the trial court granting summary judgment in favor of Midland is

AFFIRMED in part, DISMISSED in part.

Judges ELMORE and JACKSON concur.

Judge JACKSON concurred prior to 1 January 2011.

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ROGER D. BLALOCK, EMPLOYEE, PLAINTIFF V. SOUTHEASTERN MATERIAL D/B/A CUSTOM WOOD STRUCTURES, INC., EMPLOYER; BUILDERS MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA09-1530

(Filed 18 January 2011)

**Workers' Compensation— unreasonable defense—attorney fees**

The decision of workers' compensation defendants to litigate plaintiff's complex medical case for three years was unreasonable where defendants denied treatment and compensation, based on self-proclaimed "common sense" in the face of unanimous medical testimony to the contrary. The Industrial Commission's opinion and award denying attorney fees under N.C.G.S. § 97-88.1 was reversed and remanded.

Appeal by Defendants and cross-appeal by Plaintiff from amended opinion and award entered 13 August 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 August 2010.

*Poisson, Poisson & Bower, PLLC, by Fred D. Poisson, Jr. and E. Stewart Poisson, for Plaintiff-Appellee/Cross-Appellant.*

*Lewis & Roberts, P.L.L.C., by Melissa K. Walker, Sarah C. Blair, and Brian D. Lake, for Defendant-Appellants.*

BEASLEY, Judge.

Roger D. Blalock (Plaintiff) alleges the Industrial Commission (Commission) erred in denying his motion for special attorneys' fees under N.C. Gen. Stat. § 97-88.1 of the Worker's Compensation Act (Act). Specifically, Plaintiff claims the Commission should have granted his motion for special attorney's fees because Custom Wood Structures, Inc. (Employer) and its insurer, Builders Mutual Insurance Company (Carrier) (collectively Defendants), defended the hearing without reasonable ground in violation of N.C. Gen. Stat. § 97-88.1. Because we agree with Plaintiff, we reverse that portion of the Commission's opinion and award concluding that attorney's fees under § 97-88.1 are not warranted and remand for entry of a finding that Defendants defended Plaintiff's claim without reasonable ground and a determination of the appropriate amount of attorney's fees under this statute.

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Plaintiff, a long-term smoker of about thirty years, worked in construction as a carpenter for Employer for about three and one-half years. Plaintiff has a medical history of various conditions caused by his cigarette smoking, such as difficulty breathing, hoarseness, emphysema, and diffuse chronic obstructive pulmonary disease (COPD). While working for Employer on 21 October 2005, Plaintiff was tearing down a cinder block wall with a masonry saw and sledge-hammer, which caused large amounts of dust to accumulate. Plaintiff was given a painter's mask to wear and he continued sawing, but the mask was ineffective, as it was not designed for the type of protection necessary for the task. Plaintiff inhaled dust throughout the two-day period during which he was tearing down the wall. Having experienced troubled breathing and chest pains after performing this carpentry work, Plaintiff reported his acute symptoms to his supervisor. Over the next couple days, Plaintiff's shortness of breath continued, prompting him to visit his primary care physician, Dr. Kenneth D. Shank, on 24 October 2005. A chest x-ray revealed that Plaintiff had hyperinflated lungs, with evidence of underlying chronic obstructive lung disease.

During a follow-up visit on 16 November 2005, Plaintiff told Dr. Shank that his troubled breathing arose contemporaneously with his exposure to a large amount of dust at work and that his shortness of breath had continued since then. Dr. Shank then focused on Plaintiff's pulmonary problems and diagnosed him as having sustained an exacerbation of his underlying emphysema and COPD and possible pneumonitis. Having been Plaintiff's physician since May 2003, Dr. Shank knew Plaintiff smoked one to two packs of cigarettes per day for many years and had previously complained of hoarseness but noted that, even so, the 24 October 2005 visit was the first time he had ever reported an acute shortness of breath and chest pains. Dr. Shank believed that Plaintiff's underlying conditions resulted from his years of smoking and that his COPD had been exacerbated. Dr. Shank recommended that Plaintiff stop smoking and stay away from dusty areas.

On 12 December 2005, Dr. Herbie Bryan treated Plaintiff, who complained of worsening shortness of breath and vague chest pains. Plaintiff underwent a chest x-ray and a CT scan, after which Dr. Bryan diagnosed Plaintiff with dyspnea secondary to moderately advanced COPD. Observing that Plaintiff's emphysema was moderately advanced, Dr. Bryan noted that any work-related air pollution might have aggravated Plaintiff's breathing difficulties. Dr. Bryan recom-

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mended certain treatments and also advised Plaintiff to immediately and completely cease smoking cigarettes. Plaintiff continued smoking through March 2006.

On 5 January 2006, Plaintiff filed a worker's compensation claim for injury to his lungs sustained on 21 October 2005 by "sawing [a] 9 x 9 x 9 feet hole in cinderblock wall 12 inches thick with a masonry saw and inhaling dust." Upon Defendants' denial of Plaintiff's claim for compensation, Plaintiff filed a Form 33 Request for Hearing on 13 February 2006. Following the deputy commissioner's hearing of the matter on 11 September 2006, the parties took the depositions of Dr. Shank, Dr. Jill Ohar, and Dr. Selwyn Spangenthal, which were received into evidence. The deputy commissioner issued an opinion and award on 31 October 2007, concluding that Plaintiff had suffered a compensable injury and instructing Defendants to pay medical treatment costs and weekly temporary total disability benefits under N.C. Gen. Stat. §§ 97-25 and 97-29, respectively. The opinion and award also directed Defendants' to pay reasonable attorney's fees in the amount of 25% of the benefits due Plaintiff, but no award of attorney's fees under N.C. Gen. Stat. § 97-88.1 was made. Both parties appealed to the Full Commission.

Defendants' appeal disputed the compensability of Plaintiff's claim while Plaintiff's arguments raised the issue of special attorney's fees under § 97-88.1, contesting the lack of findings of fact and award thereunder. Upon review of the record, the Full Commission filed an opinion and award on 28 July 2008, which, with minor alterations, affirmed the deputy commissioner's decision, including the award of reasonable attorney's fees at 25% of benefits due. The Commission, however, failed to address the issue of attorney's fees pursuant to § 97-88.1, and on 30 July 2008, Plaintiff filed a motion requesting that the Full Commission award him attorney's fees under § 97-88 and amend its opinion and award to address the issue of attorney's fees under § 97-88.1. Before the Commission could rule on Plaintiff's motion for attorney's fees, Defendants appealed the 28 July opinion and award to this Court on 21 August 2008. The Commission subsequently entered an order on 17 November 2008 acknowledging that it should have ruled on the issue of § 97-88.1 attorney's fees but that it was divested of jurisdiction while the case was pending on appeal.

Upon Plaintiff's 1 December 2008 motion to dismiss the appeal as interlocutory, this Court dismissed Defendants appeal without prejudice on 29 December 2008. Plaintiff then renewed his motion for

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attorney's fees under § 97-88.1 on 13 January 2009, and in an amended opinion and award filed on 13 August 2009, the Commission ruled that Defendants had not been unreasonable in their defense of the action and denied Plaintiff's request for attorney's fees under § 97-88.1. The Commission concluded Plaintiff was entitled to reasonable attorney's fees under N.C. Gen. Stat. § 97-88 and ordered Defendants to pay the fees upon receipt of an affidavit or itemized statement from Plaintiff's counsel detailing the time expended preparing for and litigating the appeal. Plaintiff submitted affidavits from his counsel on 25 August 2009, and the Commission entered an order on 31 August 2009, finding the hours expended reasonable and awarding Plaintiff \$2,625.00 in attorney's fees.

Defendants filed Notice of Appeal from the Commission's amended opinion and award on 31 August 2009, addressing the issue of compensability, as permitted by this Court's order dismissing their earlier appeal without prejudice. Plaintiff filed Notice of Cross-Appeal on 11 September 2009 and assigned cross related to the Commission's denial of § 97-88.1 attorney's fees. Defendants then filed a Motion to Withdraw Appeal on 19 January 2010, indicating to this Court that it had accepted Plaintiff's claim and would pay benefits pursuant to the 13 August 2009 decision, and Defendants' appeal was dismissed on 21 January 2010. Accordingly, Plaintiff's cross-appeal is the sole source of issues presented for our review. As such, we address only whether the Commission erred in failing to find that Defendants were unfoundedly litigious in their defense of this matter and in declining to tax Defendants with Plaintiff's attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1.

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The standard of review for an award or denial of attorney's fees under N.C. Gen. Stat. § 97-88.1 (2009) is a two-part analysis. *Meares v. Dana Corp.*, 193 N.C. App. 86, 93, 666 S.E.2d 819, 825 (2008), *disc review denied*, 366 N.C. 129, 673 S.E.2d 359 (2009). "First, '[w]hether the [defendant] had a reasonable ground to bring a hearing is reviewable by this Court *de novo*.'" *Id.* (quoting *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 50-51, 464 S.E.2d 481, 484 (1995)). If this Court concludes that a party did not have reasonable ground to bring or defend a hearing, then we review the decision of whether to make an award and the amount of the award for an abuse of discretion. *See Troutman*, 121 N.C. App. at 54-55, 464 S.E.2d 486 (holding "[t]he decision of whether to make such an award, and the amount of the award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion"). In

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conducting the first step of the analysis, the reviewing court should consider the evidence presented at the hearing to determine reasonableness of a defendant's claim. *See Raper v. Mansfield Sys., Inc.*, 189 N.C. App. 277, 288, 657 S.E.2d 899, 908 (2008); *see also Cooke v. P.H. Glatfelter/Ecusta*, 130 N.C. App. 220, 225, 502 S.E.2d 419, 422 (1998) (instructing that "the Commission (and a reviewing court) must look to the evidence introduced at the hearing" to determine whether a hearing has been defended without reasonable ground). As such, "[t]he burden [is] on the defendant to place in the record evidence to support its position that it acted on 'reasonable grounds.'" *Shah v. Howard Johnson*, 140 N.C. App. 58, 64, 535 S.E.2d 577, 581 (2000). Mindful that "[t]he test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness," *Cooke*, 130 N.C. App. at 225, 502 S.E.2d at 422 (internal quotation marks and citations omitted), we now review whether Defendants had reasonable ground to defend against Plaintiff's claim for compensation.

Under § 97-88.1: "If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." N.C. Gen. Stat. § 97-88.1. "The purpose of this section is to prevent 'stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees.'" *Troutman*, 121 N.C. App. at 54, 464 S.E.2d at 485 (quoting *Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 768, 394 S.E.2d 191, 192 (1990)); *see also Chaisson v. Simpson*, 195 N.C. App. 463, 484, 673 S.E.2d 149, 164 (2009) (stating that the Act's policy is "to provide a swift and certain remedy to an injured worker"); *Ruggery v. N.C. Dep't. of Correction*, 135 N.C. App. 270, 274, 520 S.E.2d 77, 80-81 (1999) (explaining the Act's aim "to provide a swift and certain remedy to an injured worker and to ensure a limited and determinate liability for employers," and mandating liberal construction of the Act such that "benefits are not to be denied upon technical, narrow, or strict interpretation of its provisions" (internal quotation marks omitted)).

Here, Plaintiff assigns error to the Commission's finding of fact that "Defendants' defense of and actions in this claim were not unreasonable" and conclusion that Plaintiff is not entitled to attorney's fees under N.C. Gen. Stat. § 97-88.1. Plaintiff alleges Defendants did

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not present any evidence at the hearing demonstrating reasonable grounds for denying both compensability of Plaintiff's claim and the extent of Plaintiff's disability. We agree with Plaintiff. Where Defendants argue in their brief that Plaintiff's current condition and any resulting disability were more likely caused by his history of smoking than work-related dust inhalation, such is based on their non-expert "common sense" belief, which is in direct contradiction to all of the expert medical evidence in this case attributing the acute exacerbation of Plaintiff's underlying COPD to his inhalation of cinder block dust at work.

It is soundly established that employees are entitled to workers' compensation for claims based on work-related aggravation or acceleration of a pre-existing, non-work-related condition. Thus, "[w]hen a pre-existing, *nondisabling, non-job-related* condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment . . . so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent." *Morrison v. Burlington Industries*, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981); *see also Smith v. Champion Int'l*, 134 N.C. App. 180, 182, 517 S.E.2d 164, 166 (1999) ("Clearly, aggravation of a pre-existing condition which results in loss of wage earning capacity is compensable under the workers' compensation laws in our state.").

It is equally well established that if the Commission finds that an accidental work-related injury aggravated or accelerated a pre-existing condition, apportionment between the work-related injury and the non-work-related condition is never proper. *See Konrady v. U.S. Airways, Inc.*, 165 N.C. App. 620, 629 n.1, 599 S.E.2d 593, 599 n.1 (2004) ("[A]ppportionment is not appropriate when a work-related condition aggravates or accelerates a non-work-related condition."); *see also Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 390, 465 S.E.2d 343, 345-46 (1996) (explaining apportionment is possible only when the non-work-related infirmity "is neither accelerated nor aggravated by the compensable injury"); *Errante v. Cumberland County Solid Waste Management*, 106 N.C. App. 114, 119, 415 S.E.2d 583, 586 (1992) ("[A]ppportionment is not permitted when an employee becomes totally and permanently disabled due to a compensable injury's aggravation or acceleration of the employee's nondisabling, pre-existing disease or infirmity.").

In this case, Plaintiff contended that his disability is the result of an aggravation or acceleration of his pre-existing COPD. Under the

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aggravation and acceleration rule, the cause of his COPD is immaterial. Thus, the belief that Plaintiff's smoking likely caused his COPD is beside the point, and Defendants' emphasis on this impertinent fact is unavailing. The sole question as to causation here was whether a work-related accident—Plaintiff's inhalation of cinder block dust over two days—aggravated or accelerated his COPD. Three expert witnesses addressed this question and, without exception, each came to the same conclusion.

Dr. Ohar testified in her deposition that the cinder block dust “likely precipitated an exacerbation of COPD” and that the COPD “was most probably exacerbated by the dust inhalation.” She explained: “I think I'm very confident of the diagnosis. I find that, you know, regardless of his work history, it's likely he had an exacerbation of COPD caused by the dust inhalation.” She repeated this opinion at least four more times—in response to questions by both Plaintiff's and Defendants' counsel—expressing the same degree of certainty. Dr. Shank similarly testified that he treated Plaintiff following the cinder block work for “exacerbation of underlying emphysema.” He concluded that Plaintiff suffered an “acute exacerbation of his underlying COPD, as well as a possible pneumonitis due to the dust and fume exposure.” He confirmed that *both* the COPD *and* the acute exposure to the dust on 24 October 2005 were “significant contributing factors to the development [of] the symptomatology that he had on October 24.”<sup>1</sup> Like Dr. Ohar, Dr. Shank repeated himself, stating again that Plaintiff's exposure to the cinder block dust “more likely than not aggravated a preexisting lung condition.” Finally, Dr. Spangenthal, Defendants' own expert witness, reached an identical conclusion. He testified that while the COPD was consistent with cigarette smoking, he had concluded that Plaintiff's exposure to the cinder block dust “probably resulted in his acute respiratory problem.” He explained the process:

So what I think was happening here was that Mr. Blalock was a long-term cigarette smoker and probably had lost some lung

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1. See *Perry v. Burlington Industries, Inc.*, 80 N.C. App. 650, 655, 343 S.E.2d 215, 218 (1986) (holding that even though plaintiff's smoking was “probably a more significant contributing factor than his occupation” to his chronic obstructive pulmonary disease, doctor's testimony that the plaintiff's occupation did contribute significantly to the plaintiff's lung disease supported award (internal quotation marks omitted)); *Swink v. Cone Mills, Inc.*, 65 N.C. App. 397, 400, 309 S.E.2d 271, 272-73 (1983) (reversing Commission's refusal to award benefits when plaintiff's evidence demonstrated that exposure to cotton dust together with a history of cigarette smoking and tuberculosis contributed to his chronic obstructive pulmonary disease). These are well-known opinions that are more than twenty years old that could hardly have been overlooked by Defendants.

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function but not sufficient enough for it to be noticeable and affect his work. However, when he became exposed to the silica dust and the concrete he had an acute episode of airway inflammation and possibly even infection of the lower airways. Now when that occurred what happened was that he developed additional mucus production, additional bronchial spasm and at that point in time became short of breath.

Now, what happens when you have an acute inflammation from whatever cause, you might—it might take a lot of time to return back to your normal base—sort of baseline. But sometimes you do need treatment to get you back to that baseline. And I think that—so I’m not saying that he is permanently disable[d] because of this exposure, what I’m saying is that the exposure to all this dust resulted in him becoming symptomatic and brought out the fact that he did probably have underlying emphysema, which he had not noticed before.

Dr. Spagenthal then concluded:

So the reality is that yes, he was working prior to the event but I do believe that he still had underlying obstructive lung disease as a result of his cigarette smoking. What the event did was set him off and developed acute exacerbation with bronchial spasm, airway inflammation, etcetera, *and now without getting some type of treatment*, he is functioning at a lower level.

(Emphasis added.) Dr. Spangenthal also repeated his causation opinion over and over again throughout his deposition, including on cross-examination by defense counsel.

These three experts testified, in essentially identical language, that while Plaintiff’s COPD was pre-existing and likely due to his cigarette smoking, his inhalation of silica dust and concrete at work more likely than not caused an acute exacerbation of that COPD that resulted in the symptoms he began exhibiting in October 2005. There is no evidence to the contrary. The invariable expert testimony in this case, in light of the above-cited authority regarding the compensability of injuries exacerbating an employee’s underlying COPD caused by smoking, *see supra* note 1, demonstrates that there was no genuine basis for Defendants’ denial or defense of Plaintiff’s claim. Defendants’ ignorance, or affirmative disregard, of these longstanding opinions directly contradicting their position renders their defense unreasonable and unfoundedly litigious under N.C. Gen. Stat.

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§ 97-88.1. *See Troutman*, 121 N.C. App. at 52, 464 S.E.2d at 484 (“Defendant’s ignorance of a 1986 North Carolina case directly on point provides no support for their contention that grounds for requesting a hearing in 1991 were reasonable. Such a construction would encourage incompetence and thwart the legislative purpose of N.C.G.S. § 97-88.1.”).

Still, in response to Plaintiff’s argument that none of the experts supported their position, Defendants attempt to manipulate Dr. Shank’s testimony to support their position that it was not unreasonable to debate the cause of Plaintiff’s injuries. They claim Dr. Shank testified that (1) any illness could have exacerbated Plaintiff’s COPD, (2) he was familiar with Plaintiff’s exposure to dusty and smoky environments, (3) Plaintiff’s continued smoking more likely than not extended his recovery time, and (4) Plaintiff’s inability to work was related to his underlying COPD, his unrelated back pain, and unrelated anxiety. Notably, Defendants do not actually quote Dr. Shank’s testimony from the pages they cite, which, in fact, was:

Q. Wouldn’t you say that Mr. Blalock’s respiratory condition would be more likely the result of aggravating factors, such as his prior long-term smoking, continued long-term—continued smoking after the alleged exposure, along with other factors in the environment?

A. Because, when I hear aggravating, I think of the silicosis, because that’s the aggravating factor on his underlying COPD.

When asked about the cause of Plaintiff’s inability to work, Dr. Shank attributed it to the COPD “in combination with his back pain and anxiety, things like that all are contributing factors of his inability to work.” While Defendants attempt to separate the COPD from the acute exacerbation, Dr. Shank’s testimony indicates that in assessing Plaintiff’s inability to work, Dr. Shank was talking about the COPD as exacerbated by the acute episode and not as it existed prior to that episode.

As for Defendants’ suggestion that Dr. Shank’s testimony somehow supported their contention that Plaintiff’s “voluntary exposure to aggravating factors” outside his work environment, such as cigarette smoke and other dust, was the actual cause of his condition, Dr. Shank confirmed otherwise during this colloquy with Plaintiff’s counsel:

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Q. Talking about the activities of riding horses and being in the smoky diner, and living on the dirt road and cigarette smoke, do any of those activities that we've discussed or those conditions that—that [defense counsel] has asked you about, do those change your opinion as to any of the reason [sic] for the acute onset of the shortness of breath back in 2005—in, excuse me, October of 2005?

A. No.

On the page that Defendants cite as indicating that Dr. Shank believed that "*any illness*" could have exacerbated Plaintiff's existing COPD, the testimony was actually:

Q. Based on your understanding, just so we have a clear picture, what was the—the, kind of, the baseline for Mr. Blalock back in June of 2005, let's say?

A. Okay. I think he was a man who probably had some chronic cough, chronic wheezing, could do activity, was able to work, always kind of hoarse in his voice. That's his respiratory status, subjectively, based on my recollection.

Q. And—but, in your opinion, but for this exposure to the silica dust and that environment that he had described to you, would Mr. Blalock have ever experienced that acute onset of the shortness of breath like he had in October of 2005 but for that—that experience?

A. *I think he could have gone on for a long period of time close to his baseline.* I think something like that was coming, but it would have been just from the cigarettes. I don't know when that would have been. Any illness could have done that to him.

Q. Uh-huh.

A. *But I think he could have gone on a long time.*

....

Q. And, excluding—if this alleged October of 2005 exposure had not occurred, given his prior condition, could he have gotten to a point where just smoking one cigarette could have aggravated his condition and caused acute onset such as that which he had experienced with this?

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A. Just smoking one cigarette? Probably not, but I think, eventually. Like I answered her question, his continued smoking was going to put him, clinically, just right where he was *years from now, months from now*. We'll never know.

(Emphases added.)

In other words, the only evidence upon which Defendants rely as justifying their denial of Plaintiff's claim in fact establishes that the cinder block episode accelerated Plaintiff's condition. This aggravation and acceleration establishes that the condition is compensable without apportionment.

Defendants' reliance on Dr. Shank's testimony that Plaintiff's continued cigarette smoking may have prolonged his recovery does not provide any better justification for Defendants' denial of the initial claim. At best, this argument relates to the degree of Plaintiff's disability, although even as to that point, Defendants cite no authority justifying their position. Defendants, however, did not just litigate the degree of disability. Rather, as described in their Form 61—denying Plaintiff's claim because his employment “did not cause or significantly aggravate his medical conditions”—Defendants contended up until the date they withdrew their appeal that Plaintiff's condition was not caused by his work. After all of the expert depositions were taken, which established that the cinder block dust did in fact aggravate Plaintiff's COPD, Defendants appealed the deputy commissioner's opinion and award, arguing, in part, that she erred in determining “that plaintiff suffered an acute exacerbation of his underlying and pre-existing COPD as a result” of his exposure to dust. Nothing in Dr. Shank's testimony or any other evidence supports this contention.

Although Defendants also assert that evidence presented by Dr. Spangenthal supports their position, they acknowledge that “Dr. Spangenthal testified that plaintiff's exposure to cinder block dust ‘probably’ caused an exacerbation of his lung disease to the point that he now suffers from shortness of breath.” Defendants appear to be arguing that they were nonetheless justified in denying Plaintiff's claim because, according to Defendants, Dr. Spangenthal's opinion was based on the timing of events, in violation of *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 538 S.E.2d 912 (2000) and, therefore, was “insufficient to prove medical causation in this case.” See *Young*, 353 N.C. at 232, 538 S.E.2d at 916 (holding “temporal sequence” was not competent evidence of causation). Challenging one medical expert's

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testimony as incompetent, however, does not justify defense of a claim when two other experts have previously testified in support of causation and no contrary medical testimony exists. In any event, Dr. Spangenthal did not testify based solely on a temporal sequence, as Defendants contend. He examined Plaintiff's prior medical records and compared x-rays taken prior to the acute episode to those taken after the acute episode, pointing out significant differences that supported his opinion. He also explained in detail the precise process by which exacerbation from inhaling silica dust and concrete can cause someone who suffers from COPD to become symptomatic and, at least, suffer temporary disability. Such testimony is not speculative, but rather is competent under *Young*. See, e.g., *Legette v. Scotland Mem'l Hosp.*, 181 N.C. App. 437, 456, 640 S.E.2d 744, 756-57 (2007) (holding that expert testimony was admissible under *Young* when expert repeatedly testified that accident probably aggravated pre-existing condition, and opinion was not based "solely" on temporal relationship, but rather expert testified that plaintiff's description of accident was consistent with type of trauma that would result in plaintiff's condition); *Singletary v. N.C. Baptist Hosp.*, 174 N.C. App. 147, 156, 619 S.E.2d 888, 894 (2005) (holding that even though temporal relationship may have played role in diagnosis, expert's testimony was admissible because he "considered, tested for, and excluded other causes of condition").

In short, no medical evidence supports Defendants' outright denial of Plaintiff's claim. It is apparent that the sole basis for Defendants' denial is their non-expert belief that Plaintiff's cigarette smoking and exposure to other conditions was a more likely cause. As Defendants explain in their brief,

[B]ased on a common sense evaluation of the facts of this case, defendants argued that plaintiff's current condition and any resulting disability is the result of plaintiff's thirty (30) year history of smoking one (1) to two (2) packs of cigarettes per day, his continued smoking subsequent to any dust exposure on or about October 19, 2005 or October 21, 2005, and plaintiff's voluntary exposure to aggravating factors present in plaintiff's environment outside of his employment with defendant-employer, rather than his alleged exacerbation from a one-time exposure to cinder block dust at work.

This argument merely underscores why attorney's fees are warranted under N.C. Gen. Stat. § 97-88.1. Defendants cannot substitute their

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“common sense” for the opinions of experts. What is “common sense” to them is “grasping for straws” according to Dr. Ohar, who could not have more emphatically rejected Defendants’ “common sense” theory. Time and time again, when defense counsel tried to garner support from Drs. Ohar, Spangenthal, and Shank for Defendants’ theory, the expert witnesses not only rejected the theory, but explained in detail the medical reasons why they did so. Here, Defendants had no expert evidence supporting their causation theory. *See Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (explaining that when “the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury,” which is one of the best established principles in workers’ compensation law). At the point when they learned that their theory lacked any medical basis, they were obligated to cease denying and defending the claim based on a lack of causation.<sup>2</sup> While this Court has held that “[w]e do not . . . attribute to the General Assembly [in enacting § 97-88.1] an intent to deter an employer with *legitimate* doubt . . . from compelling the employee to sustain his burden of proof[,]” *Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 664, 286 S.E.2d 575, 576 (1982) (emphasis added), the expert medical evidence leaves no room for any legitimate doubt here.

It is also striking that Defendants have cited no legal authority on appeal providing a basis for their prevailing when all of the expert witnesses testified that a work-related accident aggravated and accelerated Plaintiff’s non-work-related COPD. They cite no authority supporting any contention that the fact that Plaintiff’s COPD was likely caused by his cigarette smoking precludes a claim based on aggravation of that condition. Nor do they cite any authority suggesting that his disability after the cinder block incident would be non-compensable if cigarette smoking and the silica dust both contributed to that disability. Indeed, we know of no authority that supports Defendants’ position.

In sum, Defendants lacked any evidentiary basis for their position and lacked any legal authority supporting their theory. Under these

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2. It is ironic that Defendants have argued Dr. Spangenthal’s testimony cannot support a finding of causation when they urge us to accept their own, non-expert speculation as being a “reasonable” basis for denying that Plaintiff’s work in any way caused his condition.

**McCRANN v. N.C. DEP'T OF HEALTH & HUMAN SERVS.**

[209 N.C. App. 241 (2011)]

circumstances, the Commission erred in determining that their defense of this claim was not unreasonable. Defendants' persistence in litigating a complex medical case for three years while denying an employee medical treatment and compensation, based on self-proclaimed "common sense" in the face of unanimous contrary medical testimony was unreasonable. Thus, we reverse this aspect of the Commission's amended opinion and award and remand for determination of the appropriate amount of attorney's fees authorized by N.C. Gen. Stat. § 97-88.1 under the circumstances.

Affirmed.

Judge GEER concurs.

Judge JACKSON concurred prior to 31 December 2010.

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MICHAEL JONATHAN McCRANN, JR., BY GUARDIANS KELLY C. McCRANN, AND MICHAEL J. McCRANN, PETITIONERS v. NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MENTAL HEALTH, DEVELOPMENTAL DISABILITIES AND SUBSTANCE ABUSE SERVICES, RESPONDENT

No. COA10-80

(Filed 18 January 2011)

**1. Administrative Law— final agency decision—*de novo* review applied—adoption of administrative law judge's decision permissible**

The superior court applied the appropriate *de novo* standard of review to the Department of Health and Human Services' decision denying petitioner benefits. While the Administrative Procedures Act required the trial court to make findings of fact and conclusions of law, it explicitly permitted the trial judge to adopt the administrative law judge's decision while fulfilling this duty.

**2. Administrative Law— *de novo* review—properly applied**

The superior court properly found that a waiver provision which determined petitioner's Medicaid eligibility did not carry

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the force of law as it was not promulgated in accordance with either the North Carolina Administrative Procedures Act or the federal Administrative Procedures Act. The superior court did not err in concluding that the Department of Health and Human Services' denial of benefits to petitioner was arbitrary and capricious and in reversing the order.

**3. Administrative Law— Erroneous denial of Medicaid benefits—reimbursement for services proper**

The superior court erred in denying petitioners' request for reimbursement for rehabilitation services paid by petitioners after respondent denied coverage for petitioner son's benefits. The vendor payment principle did not preclude the Department of Health and Human Services from making corrective action payments directly to petitioners and the expenses eligible for reimbursement were not limited to expenses petitioners incurred prior to acquiring Medicaid eligibility. The matter was remanded for an evidentiary hearing to determine the proper amount of reimbursement.

Appeal by respondent from order entered 25 September 2009 by Judge Donald W. Stephens in Wake County Superior Court. Appeal by petitioners from judgment entered 15 December 2009 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 31 August 2010.

*Ragsdale Liggett PLLC, by James L. Conner II and Melissa Dewey Brumback, for petitioner appellants-appellees.*

*Attorney General Roy Cooper, by Assistant Attorney General Janette Soles Nelson and Special Deputy Attorney General Richard Slipsky, for respondent appellant-appellee.*

*John R. Rittelmeyer and Holly A. Stiles for Disability Rights North Carolina, amicus curiae.*

HUNTER, JR., Robert N., Judge.

The North Carolina Department of Health and Human Services, Division of Mental Health, Developmental Disabilities, and Substance Abuse Services (hereinafter "DHHS" or "respondent") appeals the superior court's order finding respondent's denial of benefits to petitioner Michael Jonathan McCrann, Jr., was arbitrary and capricious. Respondent argues that the denial of benefits was based upon a

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federally authorized Medicaid waiver and was therefore proper. Petitioners urge this Court to affirm the superior court's finding with respect to respondent's denial of benefits, but seek our reversal of the superior court's decision to deny reimbursement to petitioners for expenses incurred to maintain the denied services throughout this appeal. After careful review, we affirm the superior court's decision finding the denial of benefits to be arbitrary and capricious, but reverse on the issue of reimbursement and remand for determination of the amount of reimbursement due to petitioners.

**I. Factual and Procedural History**

Michael Jonathan McCrann, Jr. ("Jonathan") is the twenty-eight-year-old son of Michael and Kelly McCrann. Mr. and Mrs. McCrann are Jonathan's legal guardians and join Jonathan as petitioners in this appeal. Since birth Jonathan has endured multiple disabilities including mental retardation, autism, cerebral palsy, and he is legally blind. To address the special needs of individuals such as Jonathan, North Carolina has developed a Medicaid-funded medical assistance program called the Community Alternatives Program for Persons with Mental Retardation and Other Developmental Disabilities ("CAP Program").

The centerpiece of the CAP Program is an individualized Plan of Care, which is a schedule of services to be provided to the program participant. Plans of Care are reviewed each year and are tailored to ensure the medical and social needs of each patient are met. Jonathan's Plan of Care reflects the significant amount of one-on-one services necessitated by his physical and mental disabilities and prescribes a personal caregiver to assist Jonathan with his daily functions. Without a personal caregiver, Jonathan would have significant difficulty with the most basic of daily activities such as using the bathroom, moving about safely, communicating with others, and learning. For most of his life, Jonathan has received these services under the CAP Program while living at home with his parents. In 2003, in an effort to help Jonathan become more independent, his parents moved him into a group home and continued to provide him care through a personal caregiver. Absent this intensive therapy Jonathan would require institutionalization.

For more than ten years, Edna McNeill has been the primary provider of these services for Jonathan. Ms. McNeill began caring for Jonathan in the McCranns' home and has continued in her role as Jonathan's primary caregiver since his admission to the Pinetree

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Group Home (“Pinetree”). The two have developed a trusting bond that has facilitated Jonathan’s progress from a classification of “profoundly mentally retarded” to “moderately mentally retarded.” It is not surprising then that Jonathan’s Plan of Care, which was developed by a team of professionals, his family, and himself, designates Ms. McNeill as the person best suited to provide the “home support” component of the plan.

The Code of Federal Regulations authorizes federal grants to reimburse states for medical assistance programs for the disabled, such as the CAP Program. *See* 42 C.F.R. § 430.0 (2009). For a state to be eligible for reimbursement for program expenses, the state’s program must meet certain federal requirements. States are afforded flexibility, however, to implement changes in these assistance programs in order to try more cost-effective delivery of services or to tailor services to the specific needs of certain groups of benefit recipients. *See* 42 C.F.R. § 430.25(b) (2009). States must seek approval for such program changes from the federal government through a program “waiver.” *See id.* If a waiver is approved, the federal government thereby waives compliance with state program requirements while permitting states to remain eligible for reimbursement with federal grants. *See id.* Waivers do not permit states to implement permanent changes in their Medicaid assistance programs; waivers are initially approved for a period of two to three years and may be renewed thereafter. *See* 42 U.S.C. § 430.25(h).

Operating under the 2001 Waiver, the CAP Program paid for Ms. McNeill’s services from 2002 through 2005 as that waiver permitted rehabilitation services to be provided by a third-party provider in a group home setting. In 2005, however, DHHS revised the 2001 Waiver and received approval to implement the new waiver (hereinafter the “2005 Waiver”) by the Centers for Medicare and Medicaid Services, effective 1 July 2005. After the 2005 Waiver was approved, Jonathan’s case manager reviewed and updated Jonathan’s 2005 Plan of Care to bring it in compliance with the new waiver provisions. This updated Plan of Care requested that the services provided by Ms. McNeill be continued and that the services be provided in Jonathan’s group home. The Plan of Care was approved. In April of 2006, however, upon the next annual review of Jonathan’s Plan of Care, DHHS determined that these same services should be denied.

Revisions to the CAP Program that were approved in the 2005 Waiver provide, in pertinent part:

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Individuals who live in licensed residential settings or unlicensed alternative family living arrangements may only receive the community component of this service. The community component of Home and Community supports does not replace the Residential Support provider's responsibility to provide support to individuals in their homes and the community, but is intended to support those who choose to engage in community activities that are not provided through a licensed day program.

DHHS interpreted this language to exclude third-party providers from providing services to benefit recipients in a group home setting. Thus, DHHS concluded that while the 2001 Waiver permitted Ms. McNeill to provide services to Jonathan in his group home, the 2005 Waiver precluded coverage for Ms. McNeill's services under Jonathan's Plan of Care—despite having approved the same services under the same waiver (the 2005 Waiver) the previous year. Jonathan could receive Ms. McNeill's services if he lived at home or Pinetree employees could provide *comparable* services for which the State could be reimbursed through Medicaid.

On 25 April 2006, DHHS informed the McCranns that Ms. McNeill's services would no longer be covered. The McCranns filed a petition for a contested case hearing in the Office of Administrative Hearings. In a decision entered 9 January 2008, the Administrative Law Judge ("ALJ") held that DHHS' denial of Jonathan's benefits was "arbitrary and capricious and erroneous as a matter of law." DHHS overturned the ALJ's decision in a Final Agency Decision on 30 April 2008 affirming the denial of benefits.

The McCranns petitioned for judicial review of the Final Agency Decision in Wake County Superior Court pursuant to N.C. Gen. Stat. § 150B-43 (2009). In that petition, the McCranns also sought to have the superior court order DHHS to reimburse the McCranns for their out-of-pocket expenses paid to maintain the denied benefits.<sup>1</sup> On 25 September 2009, following a hearing on the matter, Judge Donald W. Stephens adopted the decision of the ALJ and reversed DHHS' denial of benefits. From this order, DHHS appeals. In a separate order entered 15 December 2009, the superior court denied the request for

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1. Jonathan's father, Michael McCrann, believing that the Pinetree staff could not serve as a replacement for the "highly effective, compassionate, and consistent care" that Ms. McNeill had provided Jonathan since his childhood, decided it was imperative for Jonathan's health and safety that her services be maintained, even if it meant paying for those services himself. Mr. McCrann has thus continued to pay for Ms. McNeill's services since coverage for the services was denied by DHHS.

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reimbursement of expenses incurred by the McCranns to maintain Ms. McNeill's services during the pendency of the action. The McCranns appeal from this order.

**II. Jurisdiction and Standard of Review**

As the parties appeal from final judgments of a superior court entered upon the court's review of a decision of an administrative agency, this Court has jurisdiction over the appeals. N.C. Gen. Stat. §§ 7A-27(b) and 105B-52 (2009). When this Court reviews an appeal from the superior court reversing the decision of an administrative agency, our standard of review is twofold and is limited to determining: (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard. *Mayo v. N.C. State Univ.*, 168 N.C. App. 503, 507, 608 S.E.2d 116, 120, *aff'd*, 360 N.C. 52, 619 S.E.2d 502 (2005).

**III. Analysis****A. The Trial Court's Standard of Review**

[1] Respondent assigns error to the superior court's review of its Final Agency Decision. The thrust of respondent's first argument is that the superior court failed to make independent findings of fact and conclusions of law as required by the North Carolina Administrative Procedures Act ("APA"), Chapter 150B of our General Statutes and, therefore, this matter should be remanded back to the superior court to make such determinations. *See* N.C. Gen. Stat. § 150B-51 (2009). We conclude the superior court applied the proper standard of review.

The APA requires that when a trial court reviews an administrative agency's final decision that has rejected the ALJ's decision, the trial court must conduct a *de novo* review and "shall make findings of fact and conclusions of law." N.C. Gen. Stat. § 150B-51(c). Respondent urges that the superior court did not fulfill its duty because the court adopted the ALJ's decision "in its entirety, including all findings of fact and conclusions of law." Consequently, respondent contends, it is impossible to determine whether the superior court properly applied a *de novo* standard of review.

Respondent's contention, however, is contradicted by the plain language of the APA. Section 150B-51(c), which respondent correctly cites as requiring the trial court to make findings of fact and conclusions of law, states: "In reviewing the case, the court shall not give

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deference to any prior decision made in the case," however, the court "may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision; may remand the case to the agency . . . or reverse or modify the final decision . . . and may take any other action allowed by law." N.C. Gen. Stat. § 150B-51(c) (emphasis added). Thus, while the APA requires the trial court to make findings of fact and conclusions of law, it explicitly permits the trial judge to adopt the ALJ's decision while fulfilling this duty.

Respondent's contention that the trial court did not properly execute its duty is also rebutted by North Carolina case law. Addressing a similar argument that a superior court judge had not abided by his duty to make findings of fact where, after a review of the evidence, he concurred with the findings of another judge, our Supreme Court aptly concluded:

It is not to be presumed that a learned and just judge would trifle in the discharge of his duties by accepting the findings of fact by another that he ought himself to make. The presumption is to the contrary. If, upon a careful consideration of the evidence, the court found the facts to be as did his predecessor on a former like occasion in the same matter, the mere fact that he adopted the findings of fact as set down in writing is not good ground of exception or objection.

*Taylor v. Pope*, 106 N.C. 267, 269-70, 11 S.E. 257, 258 (1890) (citing *Silver Valley Min. Co. v. Baltimore Smelting Co.*, 99 N.C. 445, 6 S.E. 735 (1888)).

In the present case, the order of the superior court states, in part:

This court has carefully considered the arguments of counsel, the brief of Petitioners, . . . the decision of Judge Webster below, the Final Agency Decision, and the whole official record submitted by the Respondent. This Court has given no deference to any prior decision in this case, but has reviewed and considered the official record *de novo*.

Thus, it is evident the superior court conducted a *de novo* review of the record and made independent findings. That it was convenient to adopt the ALJ's findings has no bearing upon whether the court conducted the proper review. *See id.* at 270, 11 S.E. at 258. Accordingly, we conclude the superior court applied the appropriate standard of review and respondent's argument is without merit.

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**B. The Trial Court's Application of the Standard of Review**

[2] Having established that the superior court conducted the appropriate *de novo* review, we turn to the question of whether it applied this standard properly. *See Mayo*, 168 N.C. App. at 507, 608 S.E.2d at 120. Respondent raises two arguments in its contention that the lower court erred in its *de novo* review: (1) the superior court erred in failing to find the Waiver carried the force of law; and (2) the superior court erred in failing to find the terms of the Waiver provided legal justification for the denial of Jonathan's benefits. We conclude that the waiver provision at issue is a "rule" within the meaning of the APA and, absent promulgation in accordance with the APA, does not carry the force of law.

The North Carolina APA defines a "rule" as any agency regulation that implements or interprets an enactment of our General Assembly or the U.S. Congress or a regulation adopted by a federal agency that describes an agency's procedure or practice requirements. N.C. Gen. Stat. § 150B-2(8a) (2009). Such a rule is not valid unless adopted in accordance with the provisions of Article 2A of the APA, which requires, absent exigent circumstances, publication of the proposed change in the North Carolina Register and, in some instances, public hearings and public comment periods. N.C. Gen. Stat. §§ 150B-18 and 150B-21.1 (2009); *see Dillingham v. N.C. Dep't of Human Resources*, 132 N.C. App. 704, 710, 513 S.E.2d 823, 828 (1999).

Petitioners cite *Dillingham v. N.C. Dep't of Human Resources* in support of their argument that the Waiver does not carry the force of law. *See* 132 N.C. App. 704, 513 S.E.2d 823. In *Dillingham*, this Court addressed the validity of a provision in the Department of Social Service's ("DSS") State Adult Medicaid Manual that raised the standard of proof required to rebut a presumption of ineligibility due to alleged improper asset transfers from a "satisfactory showing" to "clear and convincing written evidence." *Id.* at 707-08, 513 S.E.2d at 826. This Court noted that while federal law required an applicant to make a "satisfactory showing" of evidence to rebut the presumption of ineligibility, neither federal statutes nor regulations defined what constituted a "satisfactory showing." *Id.* at 709, 513 S.E.2d 826-27. The contested provision in the Medicaid Manual attempted to define this standard by requiring "clear and convincing written evidence."

The *Dillingham* Court held the provision met the definition of an administrative "rule" under the APA because it created "a binding standard which interprets the eligibility provisions of the Medicaid

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law and, in addition, describes the procedure and evidentiary requirements utilized by [DSS] in determining such eligibility.” *Id.* at 710, 513 S.E.2d at 827; *see* N.C. Gen. Stat. § 150B-2(8a). Because the rule had not been adopted in accordance with Article 2 of the APA, as conceded by DSS, this Court concluded the rule was not valid. 132 N.C. App. at 710-11, 513 S.E.2d at 827. Consequently, DSS’ reliance upon the unadopted rule for determining the applicant’s eligibility for benefits was an error of law. *Id.* at 711, 513 S.E.2d at 828.

We are presented with similar circumstances in the present case. The Waiver provision at issue interprets Medicaid eligibility by defining those services Jonathan is eligible to receive under the Waiver program (the CAP Program). Thus, we conclude the trial court was correct in finding that the Waiver provision is a rule pursuant to the North Carolina APA. *See* N.C. Gen. Stat. § 150B-2(8a). Additionally, as respondent concedes, the Waiver was not promulgated in accordance with either the North Carolina APA or the federal APA. Consequently, we conclude the trial court did not err in finding the Waiver is neither state nor federal law. Nor did the trial court err in concluding respondent’s reliance upon the Waiver to deny services to petitioner was an error of law.

Respondent urges, however, that the Waiver has the “force and effect of law” under the North Carolina Supreme Court’s decision in *Arrowood v. North Carolina Dep’t Health & Human Servs.* (*Arrowood II*).<sup>2</sup> *See* 353 N.C. 351, 543 S.E.2d 481 (2001), *rev’d per curiam for reasons stated in the dissenting opinion*, 140 N.C. App. 31, 535 S.E.2d 585 (2000) (*Arrowood I*). We disagree and conclude that *Arrowood II*’s holding is limited to the unique facts of that case.

In *Arrowood I*, the North Carolina Department of Health and Human Services (“DHHS”) applied to the federal government for a waiver to reform the state welfare program. 140 N.C. App. at 33, 535 S.E.2d at 587. Upon receiving approval of the waiver, DHHS implemented a 24-month limitation on the receipt of welfare benefits by requiring all benefit applicants to sign a contract expressly limiting the receipt of benefits to 24 months. *Id.* Accordingly, the petitioner

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2. We note that in its Final Agency Decision, respondent contradicted itself on whether the 2005 Waiver is federal or state law: “[T]he Waiver is Federal Law authorized by . . . the Code of Federal Regulations.” “The Respondent objects and excepts the omission that the Code of Federal Regulations does authorize federal waivers but agrees that the Waiver is not federal law but is state law under [Arrowood II] . . . .” (Emphasis added.) On appeal, respondent does not contend whether the Waiver is state or federal law, rather it argues the Waiver has the “force and effect of law.”

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signed a contract containing the 24-month benefit limitation. *Id.* DHHS did not, however, promulgate any rules in accordance with the APA regarding the benefit limitation. *Id.* When DHHS terminated the petitioner's benefits after 24 months, the petitioner appealed the termination claiming that the 24-month limitation was neither state nor federal law and, thus, not enforceable. *Id.* at 34, 535 S.E.2d at 587-88.

Upon review by the superior court, DHHS' termination of the petitioner's benefits was affirmed and the petitioner appealed to the Court of Appeals. *Arrowood I*, 140 N.C. App. at 34, 535 S.E.2d at 588. A divided panel of this Court held that the 24-month limitation was a rule under the APA, and because DHHS failed to promulgate the rule in accordance with the North Carolina APA, the rule was not valid; DHHS' reliance upon the waiver was an error of law. *Id.* at 42, 535 S.E.2d at 592. Our Supreme Court reversed this decision, however, adopting the reasoning provided in the brief dissent in the Court of Appeals decision. *Arrowood II*, 353 N.C. 351, 543 S.E.2d 481.

In *Arrowood I*, the dissent concluded the 24-month limitation on benefits prescribed by the waiver was legally binding. *Arrowood I*, 140 N.C. App. at 44, 535 S.E.2d at 594 (Walker, J., dissenting). The dissent reasoned the waiver need not be promulgated under the APA due to the clarity of the waiver's terms and conditions and because the petitioner signed a contract that expressly limited his eligibility for benefits to 24 months. *Id.* at 44, 535 S.E.2d at 593.

Additionally, the *Arrowood I* dissent agreed with the holding in *Dillingham* that promulgation of a rule under the APA was required in that case in order for the rule to be valid. *Id.* The *Arrowood I* dissent distinguished the facts of that case by citing the lack of clarity presented in *Dillingham* wherein the Medicaid Manual required "clear and convincing written evidence," while the then-existing federal law required a "satisfactory showing" without defining how to meet this standard. *Id.* at 44, 535 S.E.2d at 594 (citing *Dillingham*, 132 N.C. App. at 711, 513 S.E.2d at 828 (1999)). Thus, "an APA rule was necessary in *Dillingham* in order to establish the proper burden of proof consistent with the federal law requirement of a 'satisfactory showing.'" *Id.*

We conclude the present case is similar to the facts presented in *Dillingham* and we agree with petitioners that *Arrowood II* is not controlling. The facts presented here lack the elements central to the *Arrowood I* dissent—the concurrence of the clarity of that waiver's terms and the notice afforded to petitioner by his contractual agree-

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ment to the 24-month limit on his benefit eligibility. Here, the Waiver provision upon which respondent relied in order to deny petitioners' benefits lacks any meaningful clarity.

As the ALJ concluded, respondent based its denial of petitioners' services on the following language of the 2005 Waiver: "Individuals who live in licensed residential settings or unlicensed alternative family living arrangements may only receive the community component of the service." Additionally, "[n]either the term 'community' nor the term 'community component' is defined in the Waiver. Nevertheless, Respondent relies upon this sentence to deny these services . . . that had been covered under the previous Waiver[.]" We cannot agree with respondent's contention that this language in the Waiver "makes it very clear" that petitioners' benefits would be denied.

The record also reveals that respondent testified the Waiver does not state that the services provided to petitioner by Ms. McNeill cannot be provided by a third-party provider in a licensed community residential setting. Rather, the author of the Waiver provision testified that while third-party providers are not specifically prohibited by the Waiver, in her opinion, "it would be very incongruent" to have a third party come into a licensed facility to provide such services—although respondent had approved Ms. McNeill to do so since 2003.

Furthermore, while the record indicates Jonathan's treatment team was aware of the new waiver provisions when they formulated his Plan of Care in March of 2006 and that they were aware their request for Home and Community Support Services to be provided in the group home might not be approved, we cannot equate these facts with the contractual agreement that existed in *Arrowood I*. Mere knowledge of the potential for denial of services is quite distinct from an agreement to be bound by terms explicitly set forth in a written contract. To hold that petitioners' awareness in this instance constituted sufficient notice so as to bind him to the new Waiver terms would establish a precedent likely to produce undesirable results. The inevitable consequence would be the imposition of a fact-based inquiry in every case involving a waiver dispute to determine whether the complainant was properly afforded notice of the newly implemented waiver provisions.

Finally, as petitioners correctly assert, extending *Arrowood II* to the facts of this case would "enact fundamental changes in administrative law." Such a holding would be in stark contrast to the uniformity in this area of the law in jurisdictions across the United States. *See In*

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*re Diel*, 158 Vt. 549, 614 A.2d 1223 (1992) (holding that a provision by Vermont's Human Services Board, which resulted in a denial of welfare benefits to certain persons, was invalid, because it had not been adopted as a rule); *Palozolo v. Dep't of Social Servs.*, 189 Mich. App. 530, 473 N.W.2d 765 (1991) (holding the state agency does not have "permissive statutory powers" to implement a provision in a program manual that was not properly promulgated under the state APA); *C.K. v. Shalala*, 883 F. Supp. 991, 1000 (D.N.J. 1995) (noting the New Jersey Department of Human Services implemented reforms to the state's welfare program after obtaining federal approval of its waiver request and *then* promulgating regulations), *aff'd by C.K. v. New Jersey Dep't of Health & Human Servs.*, 92 F.3d 171 (3d Cir. 1996).

We conclude *Arrowood I* is an exception to the general principle that "[a]n administrative rule is not valid unless adopted in accordance with the provisions of Article 2A of the Administrative Procedure Act" and its holding is limited to the unique facts of that case. *Dillingham*, 132 N.C. App. at 710, 513 S.E.2d at 827; N.C. Gen. Stat. § 150B-18. *Arrowood II* draws a clear line by which courts can recognize this exception—where the recipient of the benefits has contractually agreed to the terms of the waiver, obviating the need for further notice from promulgation of the rule in accordance with the APA. This provides legal certainty that is beneficial to both the courts and the parties. Therefore, because the provision of the waiver at issue here was a rule that was not promulgated in accordance with the APA, and the circumstances presented do not fit within the *Arrowood II* exception, the provision is not legally binding and could not properly serve as the legal basis for DHHS' denial of Jonathan's benefits.

We conclude that the superior court properly found the Waiver does not carry the force of law. Therefore, the superior court did not err in its *de novo* review and its order reversing DHHS' denial as arbitrary and capricious is affirmed.

**C. Corrective Payments**

**[3]** The second issue on appeal is whether the superior court erred in denying petitioners' request for reimbursement for the rehabilitation services Jonathan's father paid out-of-pocket since respondent denied coverage for Jonathan's benefits. Petitioners assert the federal corrective payment regulation, 42 C.F.R. § 431.246 (2009), compels respondent to promptly reimburse petitioners for the improperly denied services. Respondent, on the other hand, contends that the federal vendor payment requirements prohibit it from making any

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reimbursement directly to the recipient rather than to a Medicaid-certified vendor. *See* 42 U.S.C. § 1396a(a)(32) (2009); 42 C.F.R. §§ 447.10(d) & 447.25 (2009). We conclude petitioners are entitled to reimbursement.

**1. Entitlement to Corrective Payments**

Federal regulation of state Medicaid programs requires the state agency to “promptly make corrective payments, retroactive to the date an incorrect action was taken” if it is ultimately determined that the agency incorrectly denied coverage. 42 C.F.R. § 431.246 (2009). The “vendor payment principle,” however, generally requires payment for Medicaid services to be made only to the provider of services. *See* 42 U.S.C. § 1396a(a)(32); 42 C.F.R. § 447.10(d). This requirement encourages provider participation in Medicaid by ensuring that providers will be paid for their services absent fear of nonpayment. *See Greenstein by Horowitz v. Bane*, 833 F. Supp. 1054, 1060 (S.D.N.Y. 1993). Following this rationale, there is a logical exception to the vendor payment principal in the context of corrective action payments where the provider has already been paid for her services, and only the recipient requires reimbursement. *See Greenstein*, 833 F. Supp. at 1069; *see also Kurnik v. Dep't of Health and Rehabilitative Servs.*, 661 So. 2d 914, 918 (Fla. Dist. Ct. App. 1995) (permitting direct reimbursement for out-of-pocket expenditures for needed medication where recipient's eligibility was unreasonably delayed); *Schott v. Olszewski*, 401 F.3d 682 (6th Cir. 2005) (requiring state agency to directly reimburse claimant for expenses incurred to obtain medical services while awaiting the long-delayed approval of her Medicaid application).

In the present case, we conclude that respondent incorrectly denied Ms. McNeill's services under Jonathan's Plan of Care. Petitioners have paid Ms. McNeill for her services throughout this appeal, and therefore it is only the petitioners who require reimbursement. We conclude the vendor payment principle does not preclude DHHS from making corrective action payments directly to petitioners. *See Greenstein*, 833 F. Supp. at 1069. Therefore, respondent must make corrective payments retroactive to the date on which these services were improperly denied. *See* 42 C.F.R. § 431.246.

Respondent contends that *Greenstein* limits the exception to the vendor payment principle to those cases wherein the benefit recipient incurs expenses *prior* to acquiring Medicaid eligibility. Respondent mistakenly concludes that petitioners cite no authority for post-

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eligibility reimbursements. *See Greenstein*, 833 F. Supp. at 1063 (recognizing reimbursement to the plaintiffs for services provided both prior to and after the plaintiffs had become eligible for benefits).

Additionally, the Fourth Circuit Court of Appeals, addressing claims for reimbursement of expenses resulting from improperly denied Medicaid benefits under Virginia's state plan, noted that

under 42 U.S.C. § 1396a(a)(3) the state Medicaid plan must "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied." Under the implementing regulations, 42 C.F.R. § 431.220, *this includes any applicant who is denied assistance, as well as any recipient whose assistance is discontinued*. And, under 42 C.F.R. § 431.246, "if . . . the hearing decision is favorable to the applicant," then the state "agency must promptly make corrective payments, retroactive to the date an incorrect action was taken." Therefore, all participating states are required to have state procedures whereby applicants and recipients denied assistance may appeal that decision and, if they prevail at the hearing, receive benefits retroactive to the time of the incorrect decision.

*Randall v. Lukhard*, 709 F.2d 257, 269 (4th Cir. 1983), *aff'd in part, rev'd in part and remanded*, 729 F.2d 966 (4th Cir. 1984). Therefore, that the reimbursement sought in this case is for services provided after Jonathan was deemed eligible for Medicaid is not proper grounds for denying reimbursement.

## **2. Amount of Reimbursement**

Having established that respondent must reimburse petitioners, the proper amount of reimbursement must be determined. Respondent is skeptical as to the reasonableness of the \$22,925.00 that Michael McCrann paid out-of-pocket to maintain Ms. McNeill's services and requests that this matter be remanded to the superior court for a determination of expenses. Petitioners offer no evidence as to the reasonableness of these payments, but merely present evidence that the payments were made and that reimbursement should not be limited to the Medicaid rate. The evidence provided is insufficient to determine the basis for the amount of payments or the valuation of the services provided by Ms. McNeill. Therefore, this matter must be remanded to the superior court for an evidentiary hearing to determine the proper amount of reimbursement.

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**IV. Conclusion**

We find that the superior court applied the appropriate standard of review in examining respondent's Final Agency Decision. The superior court also applied this standard properly in concluding that respondent wrongfully denied the Home and Community Supports component of Jonathan's Plan of Care. Furthermore, we conclude that petitioners should be reimbursed for the reasonable costs expended to maintain the services from the time of respondent's wrongful denial.

Accordingly, the superior court's order reversing the Final Agency Decision is affirmed. The superior court's order denying petitioners' request for reimbursement for rehabilitation services paid out-of-pocket is reversed. We remand this matter for a determination of the proper amount of reimbursement.

Affirmed in part, reversed and remanded in part.

Judges HUNTER, Robert C., and BRYANT concur.



STATE OF NORTH CAROLINA v. REGINALD MCKINLEY WILLIAMS, DEFENDANT

No. COA09-1656

(Filed 18 January 2011)

**1. Search and Seizure— traffic stop—motion to suppress evidence—good faith mistake of identity—reasonable articulable suspicion—informant tips—revoked driver's license**

The trial court did not err in a drugs case by denying defendant's motion to suppress evidence based on its conclusion that officers had a reasonable and articulable suspicion for stopping defendant's vehicle despite the investigator's good faith mistake as to the identity of the driver. Officers had a good faith belief that defendant's driver's license was revoked, in addition to the totality of the information from three confidential informants concerning defendant's possession and sale of illegal narcotics.

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**2. Search and Seizure— motion to suppress evidence—reasonable suspicion—probable cause with exigent circumstances—intrusive search**

The trial court did not err in a drugs case by denying defendant's motion to suppress evidence based on its conclusion that the search of defendant's person and seizure of evidence was valid. The investigator had reasonable suspicion to stop defendant and probable cause with exigent circumstances to conduct a full search of defendant's person. Defendant was in possession of illegal narcotics and was attempting to destroy the drugs by swallowing them. Further, there was no intrusive search of defendant's person.

Appeal by defendant from an order entered on or about 7 July 2009 by Judge Quentin T. Sumner in Superior Court, Martin County. Heard in the Court of Appeals 26 May 2010.

*Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Douglas A. Johnston, for the State.*

*Michael J. Reece, for defendant-appellant.*

STROUD, Judge.

Reginald McKinley Williams ("defendant") appeals from the trial court's denial of his motion to suppress. We conclude that the trial court had adequate grounds for its denial of defendant's motion to suppress and affirm the trial court's ruling.

### I. Background

On or about 23 September 2008, defendant was indicted for possession with the intent to sell or deliver cocaine; maintaining a vehicle for keeping, selling, or delivering cocaine; and attaining the status of habitual felon. On 14 May 2009, defendant moved to suppress certain evidence obtained as a result of a stop and search of defendant conducted by police on 18 March 2008.

Following a hearing on defendant's motion, the trial court denied defendant's motion and issued a written order on or about 7 July 2009. After preserving his right to appeal the trial court's denial of his motion to suppress, defendant pled guilty to possession with the intent to sell or deliver cocaine and attaining the status of habitual felon. The trial court sentenced defendant to a consolidated term of 133 to 169 months imprisonment.

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**II. Reasonable suspicion to stop defendant's vehicle**

[1] Defendant first contends that the trial court's conclusion that officers had a reasonable and articulable suspicion for stopping the vehicle in which defendant was a passenger was not supported by the trial court's findings of fact.

It is well established that “[t]he standard of review to determine whether a trial court properly denied a motion to suppress is whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law.” *State v. Tadeja*, 191 N.C. App. 439, 443, 664 S.E.2d 402, 406-07 (2008). “The trial court's conclusions of law are reviewed *de novo* and must be legally correct.” *State v. Campbell*, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724, (citations, brackets, and quotation marks omitted), *appeal dismissed*, 362 N.C. 364, 664 S.E.2d 311-12 (2008). Additionally, “findings of fact to which defendant failed to assign error are binding on appeal.” *Id.* Here, defendant “failed to assign error” to any of the trial court's findings of fact in the order denying his motion to suppress. Therefore, the trial court's findings of fact are binding on appeal. *See id.* In its written motion, the trial court made the following uncontested findings of fact:

1. Investigator Charles Brown (hereinafter “Brown”) testified he is employed with the Martin County Sheriff’s Department as a narcotics investigator. Brown has an extensive background in narcotics investigation, including over 200 arrests for such offenses, and annually attends various trainings in narcotics. Brown has been in law enforcement since 1994, and worked with the Williamston Police Department prior to working with the Sheriff’s office.
2. On or about March 18, 2008, Brown was on duty and working along with Martin County Investigator John Nicholson and Williamston Police Detective Chris Garrett. On said date, these officers were conducting surveillance of the Holiday Inn parking lot located in Williamston, North Carolina.
3. Prior to March 18, 2008, Brown received information from three different confidential sources that the defendant engaged in the sale of illegal narcotics in both the Holiday Inn Lounge area and Wings and Things, another local establishment located approximately .2 of a mile from the Holiday Inn.

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4. Brown testified that two of the three confidential sources were long time informants who had supplied reliable information to Brown for six or seven years. Brown indicated that information supplied by these two informants had led to numerous arrests and served as the basis for numerous search warrants.
5. Approximately 30 days prior to March 18, 2008, these two confidential informants told Brown that the defendant, Reginald Williams, used both the Holiday Inn Lounge and Wings and Things in Williamston for the sale of narcotics. Said informants also told Brown that the defendant often traveled in a late model Jeep Cherokee. Since defendant's license was revoked, defendant often had another individual named Derrick Smith to drive the said Jeep Cherokee for him.
6. Brown further testified that a third confidential source contacted Brown to complain about the defendant selling narcotics in the open air market of the Holiday Inn Lounge. Brown testified this third source was not an informant, but simply a regular patron of the lounge who considered the lounge to be a family type atmosphere. This third confidential source did not approve of defendant's activities in the lounge.
7. Within a few days of March 18, 2008, Brown spoke by telephone with this third confidential source, and also met with him face to face, concerning defendant's activities in the Holiday Inn Lounge. In addition, on the night of March 18, 2008, this source contacted Brown by telephone and said that the defendant was currently in the Holiday Inn Lounge.
8. Shortly after receiving the telephone call from this third confidential source on March 18, 2008, Brown and other officers set up surveillance of the Holiday Inn parking lot. Brown conducted surveillance from his moving vehicle while Investigator Nicholson parked his stationary vehicle near a used car lot located across the street from the Holiday Inn. Nicholson used binoculars to conduct surveillance.
9. Brown testified he was familiar with defendant, having either arrested him or assisted other officers in arresting defendant. Prior to March 18, 2008, Brown was also aware of defendant's numerous felony convictions for drug offenses, including multiple counts of Possession with Intent to Sell and the Sale of Cocaine. Brown also knew prior to said date of Derrick Smith's involvement with illegal narcotics.

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10. Nicholson testified he was positioned approximately 175-200 yards from the main entrance. Nicholson testified that visibility was clear, and the parking lot was well lit.

11. While conducting surveillance of the Holiday Inn parking lot, Nicholson observed two known drug users enter the side entrance of the Holiday Inn. Nicholson testified that this entrance also leads to the lounge area. Nicholson observed these same two individuals exit the Holiday Inn within one to two minutes after entering, which in his training and experience is consistent with the purchase of illegal narcotics. Nicholson has worked in narcotics since 2003 with both the Williamston Police Department and the Martin County Sheriff's Office.

12. After conducting surveillance of the Holiday Inn for approximately 30 minutes, (and within minutes of observing the known drug users leave the Holiday Inn), Nicholson observed the defendant exit the side entrance of the Holiday Inn along with another black male believed to be Derrick Smith. Nicholson did not personally observe the defendant inside the Holiday Inn. Nicholson indicated he had grown up and attended school with the defendant; he was also familiar with Derrick Smith, and had known him for approximately six years.

13. Nicholson observed the defendant enter the passenger side of the late model gray Jeep Cherokee, and the other person believed to be Derrick Smith enter the driver's side. Nicholson stated he believed the driver to be Derrick Smith, although he did not get a clear view of his face prior to entering the vehicle. Nicholson notified Brown that the said individuals were leaving the Holiday Inn parking lot in the gray Jeep Cherokee, with Smith driving, and headed towards Wings and Things. The officers knew Smith's license to be revoked as well.

14. Officers observed the Jeep Cherokee exit the parking lot of the Holiday Inn onto Highway 13/17 and drive towards Wings and Things. As a result, Brown activated his blue lights and initiated a traffic stop of the Jeep Cherokee prior to reaching Wings and Things. Brown testified he initiated the stop based on several factors: 1) the belief of Derrick Smith driving the vehicle with a revoked license; 2) the information they had received from the 3 confidential sources prior to and including March 18, 2008, and corroborated by the actions of the known drug users, Smith and defendant on this occasion.

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15. After stopping the Jeep Cherokee, Brown approached the driver of the Jeep Cherokee. After requesting identification, Brown determined the driver to be Vicky Tyrone Spruill, and not Derrick Smith. Spruill appeared to possess a valid license with certain restrictions. Brown testified that both Derrick Smith and Vicky Tyrone Spruill were black males, over six feet tall, medium complexion, and a close hair cut.

16. Brown conducted a pat down “Terry Frisk” search of Spruill for officer safety, as did Nicholson of the defendant. No weapons or illegal contraband were located. Brown testified that defendant encouraged them to search the Jeep Cherokee, and did so based upon defendant’s consent.

17. Shortly thereafter, Officer Brandon McKinney arrived with his trained canine, and McKinney walked the dog around the vehicle. McKinney indicated that the dog alerted to several areas of interest, but no direct hits.

18. Brown testified that a search of the interior of the Jeep Cherokee did not reveal any weapons or illegal contraband, although he noticed what appeared to be talcum powder spread all over the interior of the vehicle. Brown testified in his training and experience this powder was used to mask the odor of illegal drugs.

19. At this time, defendant was standing in between the Jeep Cherokee and Brown’s vehicle. Brown asked defendant where did he have the drugs hidden, and Brown denied possessing any drugs. Defendant told Brown to search his person, and defendant began to unbuckle his pants in the roadway as if he were about to pull his pants down. Defendant was wearing casual clothing with long pants, a shirt, and a dew [sic] rag on his head. Brown told defendant he did not have to undress in the middle of the roadway.

20. Brown asked defendant to remove the dew [sic] rag from his head. Defendant leaned his head forward as if he were removing the dew [sic] rag, then looked up to the sky and attempted to swallow something. In his training and experience, Brown believed defendant was attempting to swallow illegal drugs. Brown testified that other suspects had attempted to swallow drugs in his presence.

21. As defendant attempted to swallow something, Brown grabbed defendant around the throat, pushed him on the hood of the vehicle, and demanded he spit out whatever he was attempting

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to swallow. After several commands and threatening to use the taser, defendant spit out a small plastic baggie that contained four dosage units of cocaine (three powder, one rock). Brown cautioned defendant that his health could be in danger if he had swallowed any narcotics, and defendant stated he had not. Brown thereafter placed defendant under arrest.

Based on these findings, the trial court concluded that “[o]fficers possessed a reasonable and articulable suspicion to justify the investigatory stop of the Jeep Cherokee, based upon the good faith belief that the driver’s license was revoked in addition to the totality of the information concerning defendant’s possession and sale of illegal narcotics.”

Defendant contends that the police officers did not have a reasonable suspicion to justify the stop of defendant’s vehicle, based on (1) their mistaken belief that the driver was Derrick Smith, whose license had been revoked, because their description of Mr. Smith was vague or (2) on the information the officers received from their three confidential informants because of the lack of corroboration of that information. Defendant concludes that based on this information and in the totality of the circumstance, “there was no reasonable suspicion that criminal activity was afoot.”

A passenger in an automobile has standing to challenge the lawfulness of a police traffic stop. *Brendlin v. California*, 551 U.S. 249, 255-56, 168 L. Ed. 2d 132, 138-39 (2007). Our Supreme Court has held that a reasonable suspicion of criminal activity is the necessary standard for traffic stops. *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440-41 (2008) (citations omitted). The Court has further noted that

[t]he Fourth Amendment protects individuals “against unreasonable searches and seizures,” U.S. Const. amend. IV, and the North Carolina Constitution provides similar protection, N.C. Const. art. I, § 20. A traffic stop is a seizure “even though the purpose of the stop is limited and the resulting detention quite brief.” *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667 (1979). Traffic stops have “been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).” *United States v. Delfin-Colina*, 464 F.3d 392, 396 (3d Cir. 2006) (citation omitted). Under *Terry* and subsequent cases, a traffic stop is permitted if the officer has a “reasonable, articulable

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suspicion that criminal activity is afoot.” *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 675, 145 L. Ed. 2d 570, 576 (2000).

Reasonable suspicion is a “less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.” *[Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000)] (citation omitted). The standard is satisfied by “‘some minimal level of objective justification.’” *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1, 10 (1989) (quoting *INS v. Delgado*, 466 U.S. 210, 217, 104 S. Ct. 1758, 1763, 80 L. Ed. 2d 247, 255 (1984)). This Court requires that “[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.” *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citing *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906). Moreover, “[a] court must consider ‘the totality of the circumstances—the whole picture’ in determining whether a reasonable suspicion” exists. *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 629 (1981)). *See generally State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008).

*Id.* at 414, 665 S.E.2d at 439-40. “Whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer’s actions in light of the facts and circumstances confronting him at the time, and not on the officer’s actual state of mind at the time the challenged action was taken.” *Maryland v. Macon*, 472 U.S. 463, 470-71, 86 L. Ed. 2d 370 (1985) (internal citation and punctuation omitted). Here, the trial court based its conclusion that Investigator Brown had a reasonable suspicion to stop defendant’s Jeep Cherokee on the police investigator’s good faith belief that the driver had a revoked license and the information concerning defendant’s drug sales, which was provided by the three informants. We will first address the information given to the investigators by the informants.

An informant’s tip can provide the needed reasonable suspicion only if it exhibits sufficient “indicia of reliability.” *Alabama v. White*, 496 U.S. 325, 330, 110 L. Ed. 2d 301, 309 (1990). “In weighing the reliability of an informant’s tip, the informant’s veracity, reliability, and basis of knowledge must be considered.” *State v. Hudgins*, 195 N.C. App. 430, 434, 672 S.E.2d 717, 719 (2009) (citing *Illinois v. Gates*, 462 U.S. 213, 230, 76 L. Ed. 2d 527, 543 (1983)). “Where the informant

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is known or where the informant relays information to an officer face-to-face, an officer can judge the credibility of the tipster first-hand and thus confirm whether the tip is sufficiently reliable to support reasonable suspicion.” *Id.* In evaluating whether an informant’s tip sufficiently provides indicia of reliability, we consider the “totality-of-the-circumstances.” *Gates*, 462 U.S. at 233, 76 L.Ed. 2d at 545.

Here, when we consider the totality of the circumstances, the tips provided by the three confidential informants were sufficiently reliable. First, Investigator Brown testified that two of the informants were long-time informants who had supplied reliable information to him for six or seven years and that information supplied by them had led to numerous arrests and had served as the basis for numerous search warrants. Second, the third confidential informant was a regular patron of the Holiday Inn and personally observed defendant selling drugs in the lounge area. Third, Investigator Brown spoke by telephone and face-to-face with the third informant regarding defendant’s activities at the Holiday Inn. Finally, Investigators Brown and Nicholson confirmed the veracity of the informants’ information. The informants told the investigators that defendant was selling narcotics at both the Holiday Inn Lounge and the Wings and Things and was driven around by another black male in a late-model Jeep Cherokee. Investigator Nicholson saw two known drug users enter the Holiday Inn and then exit shortly after; shortly thereafter, they observed defendant and another black male get into a Jeep Cherokee and exit the Holiday Inn parking lot, driving toward Wings and Things, confirming possible drug activity consistent with the informants’ tips. Therefore, these informants’ tips exhibit sufficient “indicia of reliability.” *Alabama*, 496 U.S. at 330, 110 L.Ed. 2d at 309.

Considering the totality of the circumstances, the trial court’s findings of fact show that Investigator Brown had a reasonable and articulable suspicion to stop the vehicle in which defendant was a passenger. As stated above, Investigator Brown was told by the three informants that defendant was selling narcotics at both the Holiday Inn Lounge and Wings and Things and traveled in a late-model Jeep Cherokee. Investigators knew that defendant had a suspended license; defendant often had Derrick Smith drive him around; and that Derrick Smith’s license had also been revoked. Investigator Brown was familiar with defendant, having arrested him or assisted other officers in arresting him and was aware of defendant’s numerous felony convictions for drug offenses. Investigator Brown also knew Derrick Smith and described him as a black male, over six-feet-

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tall, medium complexion, with a close hair cut. On 18 March 2008, the third informant called Investigator Brown to tell him that defendant was at the Holiday Inn Lounge. Shortly after receiving this phone call, the investigators set up surveillance of the Holiday Inn parking lot on 18 March 2008, and Investigator Nicholson observed two known drug users arrive at the Holiday Inn, enter using the side entrance; then two minutes later, he saw the same two individuals exit the Holiday Inn and leave the parking lot, confirming the possibility of drug activity inside the Holiday Inn. As the informants had informed Investigator Brown, Investigator Nicholson then observed defendant and another black male, believed to be Derrick Smith, exit the side entrance to the Holiday Inn and get into a late-model gray Jeep Cherokee. Investigator Nicholson testified that he had grown up and attended school with defendant and was familiar with Derrick Smith, having known him for approximately six years. Investigator Nicholson informed Investigator Brown that the Jeep Cherokee was exiting the Holiday Inn parking lot, and proceeding onto Highway 13/17 going towards Wings and Things. Investigator Brown then initiated a stop of the vehicle. After stopping the gray Jeep Cherokee, Investigator Brown requested identification from the driver and determined that the driver was not Derrick Smith but rather Vicky Tyrone Spruill. Brown testified that, like Derrick Smith, Mr. Spruill was a black male, over six feet tall, medium complexion, and had a close hair cut. Although the investigators did not personally observe defendant selling narcotics, these “specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training” were sufficient to create a reasonable suspicion “that criminal activity [was] afoot” to justify a brief investigatory stop of defendant’s vehicle. *Styles*, 362 N.C. at 414, 665 S.E.2d at 439. We emphasize that Investigator Brown needed only a “minimal level of objective justification[,]” *Styles*, 362 N.C. at 414, 665 S.E.2d at 439, to justify his stop of defendant’s vehicle.

We also note that the fact that the investigators were mistaken as to the identity of the driver is not dispositive as to whether the stop was lawful, as the United States Supreme Court has held that, “in order to satisfy the ‘reasonableness’ requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government [when] . . . the police officer [is] conducting a search or seizure under one of the exceptions to the warrant requirement—is not that they

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always be correct, but that they always be reasonable.” *Illinois v. Rodriguez*, 497 U.S. 177, 185, 111 L. Ed. 2d 148, 159 (1990); *See Brinegar v. United States*, 338 U.S. 160, 176, 93 L. Ed. 1879, 1891 (1949) (“Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.”). We hold that in the totality of the circumstances before us, the stop of defendant’s vehicle was reasonable despite the investigator’s good faith mistake as to the identity of the driver.

### III. Reasonable suspicion to search defendant’s person

[2] Defendant argues next that the trial court’s conclusion that the search of defendant’s person and seizure of evidence was valid was not supported by the trial court’s findings of fact. Defendant admits that he gave consent to search his person but, citing *State v. Stone*, 362 N.C. 50, 653 S.E.2d 414 (2007), argues that police exceeded the scope of that consent, by searching his mouth, and then after believing defendant was swallowing something, grabbing and choking him. Our Courts have addressed the issue of whether an officer’s search of a person attempting to swallow drugs was reasonable.

In *In re I.R.T.*, 184 N.C. App. 579, 647 S.E.2d 129 (2007), officers were on patrol in an area known for drug activity when they “observed a group of individuals standing outside an apartment building.” *Id.* at 581, 647 S.E.2d at 132. Officers approached the group and engaged them in conversation. *Id.* When one officer approached the juvenile respondent I.R.T., the juvenile looked at the officer and quickly turned his head; it appeared to the officer that the juvenile had something in his mouth. *Id.* The officer explained “that he had previously encountered individuals acting evasive and hiding crack-cocaine in their mouths, and those experiences made him suspect [the juvenile] might be hiding drugs in his mouth.” *Id.* As for the juvenile, the officer stated that “[b]y his mannerisms, by turning away, by not opening his mouth as he talked, you could tell that he had something in his mouth that he was trying to hide[.]” *Id.* The officer then requested that the juvenile spit out what was in his mouth and he spit out one crack-cocaine rock wrapped in cellophane. *Id.* The juvenile was then placed under arrest “for possession of cocaine with the intent to sell or deliver.” *Id.* The juvenile made a motion to suppress, which was denied by the trial court; following a

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bench trial, the trial court entered an order adjudicating the juvenile “delinquent for possession of cocaine with the intent to sell or deliver[;]” and the juvenile appealed from that order. *Id.* at 581-82, 647 S.E.2d at 132-33. On appeal, the juvenile argued that the trial court erred in denying his motion to suppress. *Id.* at 583, 647 S.E.2d at 133. This Court held that the juvenile was seized under the circumstances and because of “the juvenile’s conduct, his presence in a high crime area, and the police officer’s knowledge, experience, and training” the officers had a reasonable suspicion to justify an investigatory seizure of the juvenile. *Id.* at 585, 647 S.E.2d at 135. As to the search of the juvenile, the Court noted that in order for “the police [to] conduct a full search of an individual without a warrant or consent, they must have probable cause and there must be exigent circumstances.” *Id.* at 586, 647 S.E.2d at 135 (quoting *State v. Pittman*, 111 N.C. App. 808, 812, 433 S.E.2d 822, 824 (1993)). In affirming the denial of the defendant’s motion, the Court found “probable cause based on the same factors in which we found reasonable suspicion to conduct the investigatory seizure” and exigent circumstances, as the juvenile “had drugs in his mouth and could have swallowed them, destroying the evidence or harming himself.” *Id.* at 587, 647 S.E.2d at 136.

In *State v. Watson*, 119 N.C. App. 395, 458 S.E.2d 519 (1995), officers were on patrol in an unmarked car in an area where they had made numerous drug arrests when they pulled up at a convenience store and observed the defendant put something in his mouth, which one of the officers believed was crack cocaine. *Id.* at 395-96, 458 S.E.2d at 520. One of the officers knew defendant and when the officers tried to approach the defendant, he tried to enter the store but one of the officers grabbed him. *Id.* at 396, 458 S.E.2d at 520. The defendant began acting very nervous and tried to drink a soft-drink, as if he were trying to swallow something. *Id.* at 396, 458 S.E.2d at 521. The Court specifically noted that, “[i]t is a common practice of drug dealers when they see the police to drop the items or put the items in their mouth and try to conceal it from the officers or attempt to swallow the items to avoid detection.” *Id.* One of the officers “grabbed defendant by the back of his jacket and told him to spit out the drugs[,]” applied pressure to the defendant’s throat, and “told defendant not to swallow or the drugs would kill defendant.” *Id.* The defendant spit out three bags of crack cocaine to the ground and the officer-recovered these items. *Id.* Other officers testified that the defendant was a known drug dealer. *Id.* The defendant was indicted “on charges of Resisting a Public Officer and Possession With Intent to Sell or

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Deliver a Controlled Substance[;]" the defendant filed a motion to suppress; the trial court denied the defendant's motion; and the defendant pled guilty and appealed the denial of his motion. *Id.* at 397, 458 S.E.2d at 521. On appeal, the defendant argued that "the trial court erred in denying his motion to suppress evidence based on the fact that the evidence was seized in violation of defendant's rights pursuant to the Fourth and Fourteenth Amendment to the United States Constitution." *Id.* This Court, in considering the totality of the circumstances, held that there was a reasonable suspicion to justify detaining the defendant for an investigatory stop because of the defendant's evasive maneuvers to avoid detection, by putting the drugs in his mouth and attempting to go in the store; his location in a high drug transaction area; and one of the officers had previously arrested the defendant on two separate occasions. *Id.* at 398-99, 458 S.E.2d at 522. In addressing the search of the defendant's person, the Court, citing *State v. Smith*, 118 N.C. App. 106, 115, 454 S.E.2d 680, 686, *rev'd per curiam* on other grounds, 342 N.C. 407, 464 S.E.2d 45 (1995), *cert. denied*, 517 U.S. 1189, 134 L. Ed. 2d 779 (1996)<sup>1</sup>, noted that "in balancing the scope of the search against exigent circumstances in determining reasonableness, courts have allowed highly intrusive warrantless searches of individuals where exigent circumstances are shown to exist, such as imminent loss of evidence or potential health risk to the individual." *Id.* at 399, 458 S.E.2d at 522. The Court then noted that the evidence showed that "the officer applied pressure to defendant's throat so that defendant would spit out the items in his mouth[;]" the officer "testified that he told defendant to spit out the drugs or the drugs would kill him[;]" and concluded that based on the "officers' experience and training including their familiarity with the area, defendant and the practice of drug dealers to hide drugs in their mouth to elude detection, we cannot state that the officer's action reached a sufficient level of unreasonableness." *Id.* at 399, 458 S.E.2d at 522-23. The Court went on to conclude that

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1. In *State v. Smith*, 118 N.C. App. 106, 454 S.E.2d 680, the majority held that the officer's search of the defendant was "intolerable in its intensity and scope and therefore unreasonable under the Fourth Amendment." *Id.* at 116, 454 S.E.2d at 686. In Judge Walker's concurrence and dissent, he concurred in the majority opinion in "that there was probable cause and an exigency for a warrantless search of defendant[;]" but dissented "from the Court's holding that the search of defendant was 'intolerable in its intensity and scope and therefore unreasonable under the Fourth Amendment.' " *Id.* at 117, 454 S.E.2d at 686 (Walker, J. dissent). Judge Walker did not argue in his dissent that the majority cited inapplicable law but dissented from the majority's application of that law to the facts of that case. *Id.* Our Supreme Court reversed the majority opinion *per curiam* "for the reasons stated in the dissenting opinion by Judge Walker." *State v. Smith*, 342 N.C. 407, 464 S.E.2d 45 (1995).

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probable cause existed to arrest the defendant and affirmed that trial court's denial of the defendant's motion to suppress. *Id.* at 400, 458 S.E.2d at 523.

As in *I.R.T.* and *Watson*, here Investigator Brown had a reasonable suspicion to stop defendant, and probable cause with exigent circumstances to conduct a full search of defendant's person. Probable cause is "a suspicion produced by such facts as [to] indicate a fair probability that the person seized has engaged in or is engaged in criminal activity." *State v. Schiffer*, 132 N.C. App. 22, 26, 510 S.E.2d 165, 167, *disc. review denied*, 350 N.C. 847, 539 S.E.2d 5 (1999) (citing *United States v. Sokolow*, 490 U.S. 1, 7-8, 104 L. Ed. 2d 1, 10-11 (1989)). "Probable cause is a common sense, practical question based on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *State v. Wilson*, 112 N.C. App. 777, 782, 437 S.E.2d 387, 390 (1993) (citation and quotation marks omitted). "The standard to be met when considering whether probable cause exists is the totality of the circumstances." *Id.* (citation omitted). Here, the totality of the circumstances, including the factors in which we found reasonable suspicion to conduct the investigatory stop, combined with the trial court's additional findings regarding the events that occurred after investigators stopped defendant, establish that Investigator Brown had probable cause to believe that defendant was in possession of illegal narcotics and was attempting to destroy those drugs. Those additional findings include the fact that during the search of defendant's vehicle officers found "talcum powder spread all over the interior of the vehicle[];" Investigator Brown testified that "in his training and experience this powder was used to mask the odor of illegal drugs[];" when Investigator Brown began searching defendant's person and under his "dew [sic] rag" for drugs, defendant "attempted to swallow something" at that specific moment; and Investigator Brown testified that "other suspects had attempted to swallow drugs in his presence." The trial court's findings also show exigent circumstances as defendant attempted to swallow four packages of cocaine, in an attempt to destroy that evidence and Investigator Brown "cautioned defendant that his health could be in danger if he had swallowed any narcotics[.] Accordingly, we hold that the warrantless search of defendant's person was reasonable in the circumstances before us.

Defendant contends that *State v. Stone*, 362 N.C. 50, 653 S.E.2d 414 (2007), should be controlling under the facts before us as defendant

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had given Investigator Brown consent to search his person but Investigator Brown exceeded that consent. In *Stone*, the Court held that the defendant's general consent to search his person did not authorize police to conduct a very intrusive search of the defendant's person. *Id.* The defendant in *Stone* was stopped by police on the side of a public roadway for a traffic violation. *Id.* at 51-52, 653 S.E.2d at 416. The police officer asked the defendant for consent to search his person and defendant consented. *Id.* at 52, 653 S.E.2d at 416. While searching the defendant's person, the police officer checked the rear of the defendant's sweat pants, then pulled the defendant's sweat pants away from his body, and shined his flashlight on the defendant's groin area. *Id.* The defendant objected, but the officers had already observed "the white cap of what appeared to be a pill bottle tucked in between Defendant's inner thigh and testicles." *Id.* The bottle was confiscated and the defendant arrested. *Id.* The trial court denied defendant's motion to suppress, stating that the search of the defendant's person was reasonable under the circumstance; the defendant was convicted for possession with intent to sell or deliver cocaine; and a divided panel of this Court reversed the trial court's decision, holding "that the flashlight search inside defendant's pants exceeded the scope of defendant's consent." *Id.* at 53, 653 S.E.2d at 416-17. On appeal to our Supreme Court, the State contended that the search did not exceed the scope of the defendant's consent. *Id.* at 53, 653 S.E.2d at 417. The Court noted that "[t]o determine whether defendant's general consent to be searched for weapons or drugs encompassed having his pants and underwear pulled away from his body so that his genital area could be examined with a flashlight, we consider whether a reasonable person would have understood his consent to include such an examination." *Id.* at 54, 653 S.E.2d at 417 (citing *Florida v. Jimeno*, 500 U.S. 248, 251, 114 L. Ed. 2d 297, 302 (1991)). Citing *Georgia v. Randolph*, 547 U.S. 103, 111, 164 L. Ed. 2d 208, 220 (2006), the Court also noted that "the 'constant element in assessing Fourth Amendment reasonableness in consent cases is the great significance given to widely shared social expectations[,]'" and "[t]he search of . . . intimate areas would surely violate our widely shared social expectation; these areas are referred to as 'private parts' for obvious reasons." *Id.* at 55, 653 S.E.2d at 418. The Court also stated "that 'the scope of a search is generally defined by its expressed object.'" *Id.* In "considering for the first time the question of whether the scope of a general consent search necessarily includes consent for the officer to move clothing in order to observe directly the genitals of a clothed suspect[,'" the Court, in affirming this

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Court's decision, concluded "that a reasonable person in defendant's circumstances would not have understood that his general consent to search included allowing the law enforcement officer to pull his pants and underwear away from his body and shine a flashlight on his genitals." *Id.* at 56, 653 S.E.2d at 418-19.

We hold that *Stone* is inapplicable to the facts before us. Although defendant gave consent to search his person, there was no strip search or search of defendant's "private parts" on the side of a public road, as in *Stone*. Here, there was no attempt to conduct such a intrusive search on defendant's person. The findings show that defendant was concealing drugs in his mouth and officers made no request or attempt to search defendant's mouth as defendant contends. Defendant attempted to swallow the drugs, as he was being searched, and Investigator Brown "grabbed defendant around the throat, pushed him on the hood of the vehicle, and demanded he spit out whatever he was attempting to swallow." Here, even if defendant had not given consent for a search of his person, the surrounding circumstances regarding defendant's stop, the search of defendant's vehicle, and defendant's attempt to swallow something during the search of his person gave Investigator Brown probable cause, with sufficient exigent circumstances, to justify the search of defendant's mouth to prevent destruction of evidence and to protect defendant's personal health from ingestion of narcotics. Accordingly, defendant's argument is overruled.

**IV. Conclusion**

As reasonable suspicion existed for Investigator Brown to stop defendant and probable cause and exigent circumstances existed to justify the search of defendant's person, including his mouth, we affirm the trial court's denial of defendant's motion to suppress.

**AFFIRMED.**

Judges McGEE and ERVIN concur.

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LYNDA SPRINGS, PLAINTIFF V. CITY OF CHARLOTTE, TRANSIT MANAGEMENT OF CHARLOTTE, INC., AND DENNIS WAYNE NAPIER, DEFENDANTS

No. COA09-839

(Filed 18 January 2011)

**1. Medical Malpractice— causation—sufficiency of the evidence**

There was sufficient evidence of causation in an automobile accident case to deny defendants' motion for a directed verdict and send the case to the jury where defendants contended that a preexisting condition made the evidence of causation speculative. Taking the evidence in the light most favorable to plaintiff, an expert who had been one of plaintiff's treating physicians considered the possible causes of plaintiff's condition and, based on his review of the facts, plaintiff's history, and his treatment of plaintiff, testified to a reasonable degree of medical certainty that the accident caused or aggravated plaintiff's condition. Conflicts in the evidence are for the jury.

**2. Damages and Remedies— punitive—JNOV denied—no written opinion**

A punitive damages award in an automobile accident case was remanded where defendants' motion for a judgment notwithstanding the verdict was denied without a written opinion stating the reasons for upholding the final award, as required by N.C.G.S. § 1D-50.

**3. Costs— expert witness—time preparing, at trial, and testifying—travel expenses**

The trial court must include in an award of costs expert fees for time spent testifying (N.C.G.S. § 7A-305(d)), and has the discretion to award expert fees for time attending at trial when not testifying (N.C.G.S. § 7A-314(d)) and travel expenses (N.C.G.S. § 7A-314(b)). However, there was no authority to assess costs for an expert's preparation time.

Appeal by defendants from judgment entered 15 August 2008 and orders entered 6 November 2008 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 January 2010.

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*The Odom Firm, PLLC, by T. LaFontine Odom, Sr., Thomas L. Odom, Jr., and David W. Murray, for plaintiff-appellee.*

*Robert D. McDonnell for defendants-appellants Transit Management of Charlotte, Inc. and the City of Charlotte; and Frank B. Aycock, II for defendant-appellant Dennis Wayne Napier.*

GEER, Judge.

Defendants City of Charlotte (“the City”), Transit Management of Charlotte (“TMOC”), and Dennis Wayne Napier appeal from a judgment entered in a negligence action brought by plaintiff Lynda Springs following a motor vehicle accident. We uphold the trial court’s denial of the motion for a directed verdict and judgment notwithstanding the verdict (“JNOV”) on the issue of permanent injuries, but we agree with defendants that the trial court erred in not providing a written opinion setting out its reasons for denying the JNOV motion with respect to the award of punitive damages as required by N.C. Gen. Stat. § 1D-50 (2009) and *Hudgins v. Wagoner*, 204 N.C. App. 480, 494-95, 694 S.E.2d 436, 447-48 (2010), *disc. review denied*, — N.C. —, 706 S.E.2d 250 (2011). We also hold that the trial court did not fully comply with the statutes governing awards of costs, and, therefore, on remand, the court must reconsider its costs decision in addition to providing a written opinion setting out its reasons for upholding the punitive damages award.

**Facts**

TMOC is a company that employs and manages bus drivers for the City. On 16 June 2004, Mr. Napier, an employee of TMOC, was operating a City bus within the course and scope of his employment when the bus rear-ended a van stopped at a red light at an intersection. Earl Springs, the driver of the rear-ended van, had been driving his wife, Mrs. Springs, home from a medical appointment. Mrs. Springs cannot walk and is wheelchair-bound due to Multiple Sclerosis (“MS”). Mrs. Springs was secured in her wheelchair beside her husband in the van.

Several seconds after Mr. and Mrs. Springs stopped at the intersection, the bus driven by Mr. Napier slammed into the back of the van at a rate of speed somewhere between 25 and 45 miles per hour. After the impact, the van traveled about 342 feet, with the bus leaving 70 feet of skid marks and traveling 25 feet after impact.

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The impact broke the back of Mrs. Springs' wheelchair, causing her to be catapulted into the back of the van, striking multiple parts of her body. Mrs. Springs was transported to Presbyterian Hospital, where she was examined by Dr. John Clark. Dr. Clark observed multiple lacerations caused by flying glass. He diagnosed Mrs. Springs with an acute cervical strain, a sprained dorsal spine, and contusions to the right shoulder and elbow.

Five months later, in November 2004, Mrs. Springs was diagnosed with avascular necrosis in her right shoulder—a lack of blood supply to the bone resulting in a dying of the bone. She continues to have right shoulder and bilateral shoulder pain and limited range of motion. Prior to the collision, she was able to transfer herself to and from her wheelchair, cook, clean, assist in her bathing, change her catheter, and drive a motor vehicle unassisted. Since the collision, she has not been able to do these tasks because of the injuries and pain in her shoulders.

On 14 June 2007, Mrs. Springs filed suit against defendants, alleging negligence by defendants and negligent entrustment, hiring, and retention by TMOC and the City. At trial, defendants stipulated that Mr. Napier was negligent, that he collided with the Springs van, and that the collision caused injuries to Mrs. Springs. Defendants disputed, however, that any permanent conditions suffered by Mrs. Springs were caused by the accident. On 8 August 2008, the jury returned a verdict for Mrs. Springs against all defendants, awarding her \$800,000.00 in compensatory damages. The jury also found that Mrs. Springs was injured by TMOC's willful or wanton conduct and was entitled to recover \$250,000.00 from TMOC in punitive damages.

The trial court entered judgment on the verdict on 15 August 2008. On 21 August 2008, defendants filed a motion for JNOV and a motion for a new trial. Mrs. Springs filed a motion to tax costs against defendants on 21 August 2008 and an amended motion to tax costs on 25 August 2008. On 6 November 2008, the trial court entered an order granting Mrs. Springs costs in the amount of \$58,034.17. The trial court also entered an order denying defendants' motions for JNOV and for a new trial. Defendants timely appealed to this Court.

## I

[1] Defendants first argue that the court erred in sending the issue of permanent injuries to the jury because Mrs. Springs failed to present

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sufficient evidence of causation of her injuries.<sup>1</sup> This Court has explained:

With respect to the evidence sufficient to warrant an instruction as to permanency, our Supreme Court has made the following remarks:

To warrant an instruction permitting an award for permanent injuries, the evidence must show the permanency of the injury and that it proximately resulted from the wrongful act with reasonable certainty. While absolute certainty of the permanency of the injury and that it proximately resulted from the wrongful act need not be shown to support an instruction thereon, no such instruction should be given where the evidence respecting permanency and that it proximately resulted from the wrongful act is purely speculative or conjectural.

*Short v. Chapman*, 261 N.C. 674, 682, 136 S.E.2d 40, 46-47 (1964). Thus, a permanency instruction is proper if there is sufficient evidence both as to (1) proximate cause and (2) the permanent nature of any injuries.

*Matthews v. Food Lion, Inc.*, 135 N.C. App. 784, 785, 522 S.E.2d 587, 588 (1999).

In this case, the issue is the sufficiency of Mrs. Springs' evidence of proximate causation of her injuries. Defendants argue that the evidence presented by Mrs. Springs regarding causation through Dr. David Kingery, a board-certified expert in orthopedics and one of Mrs. Springs' treating physicians, was merely "speculative." They contend that their expert evidence showed that the real causes of Mrs. Springs' shoulder condition were preexisting, progressive problems and that she would have been in the same condition even if the accident had never occurred. According to defendants, the trial court, therefore, erred in denying their motion for a directed verdict and their motion for JNOV on the issue of permanent injuries.

"The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for JNOV are identical. We must determine 'whether, upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom and

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1. Although defendants, at times, articulate the issue as an error in the jury instructions, it is apparent from defendants' arguments that they are actually contending that Mrs. Springs failed to prove causation.

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resolving all conflicts of any evidence in favor of the non-movant, the evidence is sufficient to be submitted to the jury.’” *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (internal citation omitted) (quoting *Denson v. Richmond County*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003)), *disc. review denied*, 363 N.C. 583, 682 S.E.2d 389 (2009).

“A motion for either a directed verdict or JNOV ‘should be denied if there is more than a scintilla of evidence supporting each element of the non-movant’s claim.’” *Id.* (quoting *Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 250, 565 S.E.2d 248, 252 (2002), *disc. review denied*, 356 N.C. 667, 576 S.E.2d 330 (2003)). “A ‘scintilla of evidence’ is defined as ‘very slight evidence.’” *Everhart v. O’Charley’s Inc.*, 200 N.C. App. 142, 149, 683 S.E.2d 728, 735 (2009) (quoting *Scarborough v. Dillard’s Inc.*, 188 N.C. App. 430, 434, 655 S.E.2d 875, 878 (2008), *rev’d on other grounds*, 363 N.C. 715, 693 S.E.2d 640 (2009)).

At trial, Mrs. Springs presented sufficient evidence to permit a jury to attribute her avascular necrosis and right shoulder pain to the accident. Dr. Clark, who treated Mrs. Springs in the emergency room immediately after the accident, testified that he saw no indication of advanced avascular necrosis or arthritis in Mrs. Springs’ right shoulder. He diagnosed Mrs. Springs as suffering a contusion of the right shoulder, as well as a contusion of her right elbow, an acute cervical strain, and a sprained dorsal spine. Photographs taken after the accident showed extensive bruising of both of Mrs. Springs’ shoulders and arms.

Dr. Kingery saw Mrs. Springs on referral from her primary care physician for treatment of the pain in her right shoulder and right elbow. X-rays of her elbow were negative, causing him to conclude that her elbow pain was the result of a contusion. The x-rays of her shoulder, however, “showed arthritis, but showed a condition called avascular necrosis as a cause for that arthritis.” He gave Mrs. Springs a “diagnosis [of] progressive arthritis due to avascular necrosis of the right shoulder.”

Dr. Kingery saw no reference in Mrs. Springs’ records, radiographs, or MRIs indicating that Mrs. Springs had been diagnosed with avascular necrosis of the right shoulder prior to the accident on 16 June 2004. Dr. Kingery acknowledged that avascular necrosis can have different causes, but identified two possible causes for Mrs. Springs’ avascular necrosis: “Trauma and in all likelihood, although I have not seen all of the evidence, prednisone usage for her MS or

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multiple sclerosis.” Dr. Kingery was then asked, based on the facts of the collision and the examination by Dr. Clark in the emergency room, whether he had “a medical opinion [he could] state with reasonable certainty as to whether or not the collision, and the injury she received in that collision, caused the avascular necrosis.” Dr. Kingery responded: “My medical opinion is that the injury she experienced in her June—in June, either caused or aggravated a condition that resulted in [her] subsequent inability to use particularly her right arm for future function.”

Dr. Frederick Pfeiffer, a neurologist who had treated Mrs. Springs for nearly 20 years, also testified that he was not aware of Mrs. Springs ever having been diagnosed with avascular necrosis prior to the accident. Further, he explained:

Multiple sclerosis does not cause a vascular [sic] necrosis. There are medicines that we give that can cause a vascular [sic] necrosis, but [Mrs. Springs] hasn’t had that very much. . . .

Multiple sclerosis wouldn’t cause pain that hurts when you move your arms or try to hold your arms over your head.

According to Dr. Emmet Dyer, a neurosurgeon who treated Mrs. Springs, no MRI or x-ray of Mrs. Springs’ shoulder that he had reviewed indicated that she ever had avascular necrosis prior to the accident. Dr. Dyer further explained that “[b]ased on a reasonable degree of medical certainty, I do think that her cervical spondylosis and resulting pain was aggravated by a rear-end accident.”

Defendants, however, argue that Dr. Kingery’s testimony as to the cause of Mrs. Springs’ condition was merely speculative and insufficient to prove causation because other portions of his testimony “tended to show his opinion was really a guess.” In support of their position, defendants cite *Sabol v. Parrish Realty of Zebulon, Inc.*, 77 N.C. App. 680, 686, 336 S.E.2d 124, 127-28 (1985) (internal citation omitted), *aff’d per curiam*, 316 N.C. 549, 342 S.E.2d 522 (1986), in which the Court held: “Plaintiff must not only show that the damage *might* have been caused because of the defendant’s negligence, but must show by reasonable affirmative evidence that it *did* so originate. If all that can be said is that the defendant *may* have done the acts which caused the injury, and it is equally true that defendant may not have, then the evidence is merely conjectural and is not sufficient to go to the jury.”

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In this case, in contrast to *Sabol*, the expert witness testimony did not suggest that two potential causes of the avascular necrosis were equally possible. Although Dr. Kingery acknowledged that, as a general matter, there are various possible causes for avascular necrosis, he testified that, in his opinion, to a reasonable degree of medical certainty, the accident caused or aggravated Mrs. Springs' condition.

This case is also unlike *Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 663 S.E.2d 450 (2008), *cert. denied*, 363 N.C. 372, 678 S.E.2d 232 (2009), *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 538 S.E.2d 912 (2000), and *Maharias v. Weathers Bros. Moving & Storage*, 257 N.C. 767, 127 S.E.2d 548 (1962), the remaining cases upon which defendants rely. In *Azar*, the expert witness testified that the plaintiff's bedsores were "at least one cause of infection" and that she died "as a result of all of [her] complications," but could not identify which complication was the ultimate cause of her death. 191 N.C. App. at 371-72, 663 S.E.2d at 453. In *Young*, the expert witness testified that there were several potential causes of the plaintiff's fibromyalgia other than her work-related back injury, but that he had not performed any testing to determine what was, in fact, the cause of her symptoms. 353 N.C. at 231, 538 S.E.2d at 915. And, in *Maharias*, the expert witness testified that a particular event "could have" caused the injury and that it was "possible" that it could have happened from any number of causes. 257 N.C. at 767, 127 S.E.2d at 549.

Here, by contrast, Dr. Kingery had considered the possible causes of Mrs. Springs' right arm condition and, based on his review of the facts, his treatment of Mrs. Springs, and Mrs. Springs' history, ultimately testified to a reasonable degree of medical certainty that the accident caused or aggravated Mrs. Springs' condition. This testimony was not merely conjectural, but rather was sufficient evidence of causation supporting the court's decision to send the issue to the jury. *See Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003) (explaining that while "an expert's 'speculation' is insufficient to establish causation," "medical certainty is not required"). *See also Weaver v. Sheppa*, 186 N.C. App. 412, 417-18, 651 S.E.2d 395, 399 (2007) (holding court erred in granting defendants' motion for JNOV where plaintiffs' expert testified to "a high degree of certainty" as to cause of injury), *disc. review allowed*, 362 N.C. 180, 657 S.E.2d 669, *aff'd per curiam*, 362 N.C. 341, 661 S.E.2d 733 (2008); *Seay v. Wal-Mart Stores, Inc.*, 180 N.C. App. 432, 436, 637 S.E.2d 299, 302 (2006) ("In order to be sufficient to support a finding that a stated cause produced a stated result, evidence on causation

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must indicate a reasonable scientific probability that the stated cause produced the stated result.’ ” (quoting *Johnson v. Piggly Wiggly of Pinetops, Inc.*, 156 N.C. App. 42, 49, 575 S.E.2d 797, 802, *disc. review denied*, 357 N.C. 251, 582 S.E.2d 271 (2003))).

Defendants point to Dr. Kingery’s statement on cross-examination that prednisone usage “could” have caused her avascular necrosis and argue that Dr. Kingery “presented only a choice of possibilities as to the cause of Mrs. Springs’ pain.” *Matthews* is, however, materially indistinguishable and controlling on this point.

In *Matthews*, 135 N.C. App. at 784-85, 522 S.E.2d at 588, a slip-and-fall case, the defendant argued that the evidence presented at trial was insufficient to warrant an instruction as to the permanency of the plaintiff’s injury. The Court rejected this argument based on an expert witness’ testimony that, to a reasonable degree of medical certainty, the plaintiff’s fall caused her herniated disk, and she would continue to experience pain for the rest of her life as a result of the fall. *Id.* at 786, 522 S.E.2d at 589.

The defendant in *Matthews*, however, like defendants here, pointed to the expert witness’ testimony on cross-examination regarding the plaintiff’s prior history of back problems unrelated to the fall as “effectively nullif[ying] his testimony on direct regarding permanency and proximate cause.” *Id.* On cross-examination, the expert witness had agreed that more likely than not the plaintiff’s prior car injury would have led to future back pain and that even if she had not slipped and fallen, the plaintiff would have continued to suffer residual back pain unrelated to any fall at the defendant’s store. *Id.* at 786-87, 522 S.E.2d at 589. This Court held that the cross-examination did not nullify the direct examination testimony because the expert witness “neither corrected nor contradicted himself in his cross-examination.” *Id.* at 787, 522 S.E.2d at 589-90.

Here, Dr. Kingery, like the expert in *Matthews*, testified on direct examination to a reasonable degree of medical certainty that the accident caused or aggravated Mrs. Springs’ right arm and shoulder condition. The evidence defendants point to on cross-examination that steroid use “could” have caused the avascular necrosis did not “nullify” Dr. Kingery’s direct testimony. *Id.* On direct examination, prior to giving his ultimate opinion on causation, Dr. Kingery had identified steroid use as one of two possible causes of Mrs. Springs’ avascular necrosis, just as he did during cross-examination. On cross-examination, Dr. Kingery simply repeated the steroid possibility, but

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did not recant or in any way correct or contradict his opinion on direct examination that he believed the accident had in fact caused or aggravated the right shoulder condition.

In addition, in viewing the evidence presented at trial in the light most favorable to Mrs. Springs, we cannot consider Dr. Kingery's testimony in isolation. Dr. Pfeiffer testified that although some medicines used to treat MS can cause avascular necrosis, Mrs. Springs "hasn't had that very much." Thus, although Dr. Kingery acknowledged that avascular necrosis can come from either trauma or steroids, Dr. Pfeiffer's testimony would permit a jury to find that Mrs. Springs had not taken enough steroids to cause avascular necrosis, leaving the trauma from the accident as the likely cause.

Defendants also point to other evidence in the record that they contend supports their contention that Mrs. Springs' condition was not caused by the accident and that there were other "credible alternative explanations." This argument disregards the standard of review: "[O]n a motion for directed verdict[,] conflicts in the evidence unfavorable to the plaintiff must be disregarded." *Polk v. Biles*, 92 N.C. App. 86, 88, 373 S.E.2d 570, 571 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 798 (1989). Conflicts in the evidence and contradictions within a particular witness' testimony are "for the jury to resolve." *Shields v. Nationwide Mut. Fire Ins. Co.*, 61 N.C. App. 365, 374, 301 S.E.2d 439, 445, *disc. review denied*, 308 N.C. 678, 304 S.E.2d 759 (1983). Accordingly, the trial court did not err in denying defendants' motion for a directed verdict and in instructing the jury on the issue of permanent injuries.<sup>2</sup>

## II

[2] Defendant TMOC challenges the punitive damages award entered against it. Under N.C. Gen. Stat. § 1D-15(a) (2009), "[p]unitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud[;] (2) Malice[;

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2. On this issue, Mrs. Springs argues alternatively that the trial court erred in excluding portions of the testimony of Dr. Dyer and that the excluded evidence would have provided further support regarding causation. Because that testimony was never considered by the jury, this argument cannot provide an alternative ground for upholding the decision below, but rather would be appropriate under N.C.R. App. P. 28(c) as an argument for allowing a new trial instead of ordering entry of a JNOV for defendants (relief not sought by Mrs. Springs). Since we have upheld the trial court's decision based on the existing evidence, we do not address this issue.

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or] (3) Willful or wanton conduct." The plaintiff "must prove the existence of an aggravating factor by clear and convincing evidence." N.C. Gen. Stat. § 1D-15(b). In this case, Mrs. Springs contended that TMOC engaged in willful or wanton conduct.

After the jury awarded punitive damages in the amount of \$250,000.00, TMOC filed a motion for JNOV, asserting with respect to the punitive damages award that "[t]here was no competent evidence of any willful or wanton conduct which would rise to a level allowing any punitive damages." N.C. Gen. Stat. § 1D-50 provides: "When reviewing the evidence regarding a finding by the trier of fact concerning liability for punitive damages in accordance with G.S. 1D-15(a), or regarding the amount of punitive damages awarded, the trial court shall state in a written opinion its reasons for upholding or disturbing the finding or award." We agree with TMOC's argument on appeal that the trial court failed to comply with N.C. Gen. Stat. § 1D-50 because it did not set out in a written opinion its reasons for upholding the jury's punitive damages award.

Our Supreme Court addressed the requirements of N.C. Gen. Stat. § 1D-50 in *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 722-23, 693 S.E.2d 640, 644-45 (2009):

[T]he language of [this] statute does not require findings of fact, but rather that the trial court "shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the court shall address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages." N.C.G.S. § 1D-50. That the trial court utilizes findings to address with specificity the evidence bearing on liability for punitive damages is not improper; the "findings," however, merely provide a convenient format with which all trial judges are familiar to set out the evidence forming the basis of the judge's opinion. The trial judge does not determine the truth or falsity of the evidence or weigh the evidence, but simply recites the evidence, or lack thereof, forming the basis of the judge's opinion. As such, these findings are not binding on the appellate court even if unchallenged by the appellant. *These findings do, however, provide valuable assistance to the appellate court in determining whether as a matter of law the evidence, when considered in the light most favorable to the nonmoving party, is sufficient to be considered by the jury as clear and convincing on the issue of punitive damages.*

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(Emphasis added.)

This Court recently applied *Scarborough* and N.C. Gen. Stat. § 1D-50 in *Hudgins*, 204 N.C. App. at 494-95, 694 S.E.2d at 447. In *Hudgins*, as in this case, the trial court denied the defendants' motion for JNOV as to punitive damages, but it did not enter a written opinion stating its reasons for upholding the award. *Id.* at 495, 694 S.E.2d at 447. On appeal, this Court held: "The case *sub judice* does not contain a written opinion stating the trial court's reasons for upholding the final award. Pursuant to the Supreme Court's express holding [in *Scarborough*] and clear instruction based upon a statutory mandate, we are constrained to reverse the trial court's denial of defendants' motion for JNOV with respect to punitive damages, and we remand the matter for the limited purpose of entering a written opinion as to those damages in view of *Scarborough*." *Id.*, 694 S.E.2d at 447-48. Because of the absence of a written opinion and the need for remand, the Court did not address the merits of the defendants' argument that there was insufficient evidence to support the punitive damages award.

We are bound by *Scarborough* and *Hudgins*. Since the trial court's order addressing defendants' motion for JNOV simply stated that the motion was denied without complying with N.C. Gen. Stat. § 1D-50, we must remand to allow the trial court to enter a written opinion setting out its reasons for upholding the punitive damages award. We cannot address the merits of TMOC's arguments regarding the sufficiency of the evidence in the absence of the required written opinion.<sup>3</sup>

## III

[3] Lastly, defendants argue that the trial court violated N.C. Gen. Stat. § 7A-305(d) (2009) by reimbursing Mrs. Springs for certain expert witness fees. In her motion for costs, Mrs. Springs sought a total of \$58,099.92: \$44,854.61 for subpoenaed expert witnesses' fees for time spent in trial preparation and at trial, \$7,817.64 for deposition expenses, \$740.75 for mediation expenses, \$110.00 for a filing fee, and

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3. On this issue, Mrs. Springs also contends the trial court should have allowed her to present evidence of additional collisions caused by Napier after her collision. Although Mrs. Springs offers this argument as an alternative basis for *upholding* the punitive damages award, citing former N.C.R. App. P. 10(d), we fail to see how evidence never heard by the jury can be used to support the jury's verdict. Although this argument could be asserted as a basis for a new trial, pursuant to N.C.R. App. P. 28(c), we do not address the issue as we are remanding the punitive damages issue to the trial court.

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\$4,576.92 for trial exhibits. The trial court granted her motion and awarded costs in the amount of \$58,034.17.<sup>4</sup>

Defendants contend that under the amended version of N.C. Gen. Stat. § 7A-305(d), effective 1 August 2007, they are liable only for the actual time spent by the experts testifying on the stand and that the trial court thus erred to the extent that its award covered the experts' time spent in preparation or waiting to testify. N.C. Gen. Stat. § 7A-305(d) sets out the costs that the trial court is "required to assess." *Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 734, 596 S.E.2d 891, 895 (2004). Under the recently added N.C. Gen. Stat. § 7A-305(d)(11), a trial court is required to assess costs for "[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings." We agree with defendants that, given the unambiguous language used, N.C. Gen. Stat. § 7A-305(d)(11) refers to an expert witness' actual time testifying and not any other time.

N.C. Gen. Stat. § 7A-305(d) may not, however, be read alone, but rather must be "read in conjunction with" N.C. Gen. Stat. § 7A-314 (2009), which governs fees for witnesses. *Morgan v. Steiner*, 173 N.C. App. 577, 583, 619 S.E.2d 516, 520 (2005), *disc. review denied*, 360 N.C. 648, 636 S.E.2d 808 (2006). N.C. Gen. Stat. § 7A-314(a) provides that a witness under subpoena "shall be entitled to receive five dollars (\$5.00) per day, or fraction thereof, during his attendance." Logically, as *Morgan* assumed, this provision allows for a fee for attendance at trial. 173 N.C. App. at 583-84, 619 S.E.2d at 520-21 ("Section 7A-314(a) provides for the payment of witnesses who are in attendance at trial pursuant to a subpoena.").

N.C. Gen. Stat. § 7A-314(d) "modifies" § 7A-314(a) by permitting the trial court, in its discretion, to increase a subpoenaed expert witness' compensation for attendance at trial. *State v. Johnson*, 282 N.C. 1, 27-28, 191 S.E.2d 641, 659 (1972). See N.C. Gen. Stat. § 7A-314(d) ("An expert witness . . . shall receive such compensation and allowances as the court . . . , in its discretion, may authorize."). As this Court has explained, "[t]he public policy" underlying the rule allowing payment of a fee to subpoenaed witnesses, including expert witnesses, "is that

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4. Although defendants generally state in their appellate brief that the trial court was not authorized to award "'additional cost[s]' " (which, in Mrs. Springs' motion, referred to the filing fee and exhibit costs), defendants do not articulate any basis for overturning the award as to those costs. Defendants only specifically challenge the award with respect to costs for expert witnesses. We, therefore, address solely this issue and express no opinion as to any other issues defendants could have raised.

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a witness should be compensated for what he is obligated by the State to do." *Greene v. Hoekstra*, 189 N.C. App. 179, 181, 657 S.E.2d 415, 417 (2008).

Defendants' argument addresses only N.C. Gen. Stat. § 7A-305(d)(11) and not N.C. Gen. Stat. § 7A-314. If we were to accept defendants' contention that a trial court may only include within an award of costs expert witness compensation for time spent actually testifying, we would effectively render meaningless N.C. Gen. Stat. § 7A-314(d). Under established principles of statutory construction, "[a] statute is not deemed to be repealed merely by the enactment of another statute on the same subject. The later statute on the same subject does not repeal the earlier if both can stand, or where they are cumulative, and the court will give effect to statutes covering the same subject matter where they are not absolutely irreconcilable and when no purpose of repeal is clearly indicated." *Person v. Garrett*, 280 N.C. 163, 165-66, 184 S.E.2d 873, 874 (1971).

Since, when the General Assembly amended N.C. Gen. Stat. § 7A-305, it left N.C. Gen. Stat. § 7A-314 intact, it must have intended that § 7A-314 continue to have meaning. Significantly, N.C. Gen. Stat. § 6-20 (2009) specifically anticipates that N.C. Gen. Stat. § 7A-305(d) will not necessarily be the only statute addressing a trial court's authority to award costs: "Costs awarded by the court are subject to the limitations on assessable or recoverable costs set forth in G.S. 7A-305(d), unless specifically provided for otherwise in the General Statutes." (Emphasis added.) This Court has, in fact, recently held: "As § 7A-305(d)(11) now codifies the trial court's authority to award discretionary expert witness fees (formerly read into subsection (1)) the statutory provision for expert witness fees must likewise be read in conjunction with §7A-314." *Jarrell v. Charlotte-Mecklenburg Hosp. Auth.*, 206 N.C. App. 559, 563, 698 S.E.2d 190, 193 (2010).

We believe that N.C. Gen. Stat. § 7A-305(d)(11) and N.C. Gen. Stat. § 7A-314 can both be given effect. If a cost is set forth in N.C. Gen. Stat. § 7A-305(d), "the trial court is required to assess the item as costs." *Priest v. Safety-Kleen Sys., Inc.*, 191 N.C. App. 341, 343, 663 S.E.2d 351, 353 (2008) (quoting *Miller v. Forsyth Mem'l Hosp., Inc.*, 173 N.C. App. 385, 391, 618 S.E.2d 838, 843 (2005)). Accordingly, under N.C. Gen. Stat. § 7A-305(d)(11), a trial court is required to include within an award of costs expert fees for time spent by the witness actually testifying. In addition, however, under N.C. Gen. Stat. § 7A-314(d), the trial court has discretion to award expert fees

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for an expert witness' time in attendance at trial even when not testifying. Further, the trial court has discretion to award travel expenses for experts as provided under N.C. Gen. Stat. § 7A-314(b).

Nevertheless, we find no authority in the current statutes authorizing the trial court to assess costs for an expert witness' preparation time. Despite Mrs. Springs' argument to the contrary, N.C. Gen. Stat. § 7A-305(d)(1), which provides for an award of "[w]itness fees, as provided by law," does not authorize the trial court to award any fees for expert witnesses. It is well established that "a section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application. In such situation the specially treated situation is regarded as an exception to the general provision." *State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (internal citation omitted). Consequently, § 7A-305(d)(11) controls over the more general § 7A-305(d)(1).

The trial court erred to the extent that it awarded as costs expert witness fees not specifically provided for by N.C. Gen. Stat. § 7A-305(d)(11) or § 7A-314. We, therefore, reverse the award of costs and remand for reconsideration in light of the controlling statutes.

Affirmed in part; reversed and remanded in part.

Judges CALABRIA and STEPHENS concur.

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WALTER POWELL, SR., PETITIONER v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RESPONDENT

No. COA10-490

(Filed 18 January 2011)

**1. Administrative Law— Department of Transportation—delegation of authority—lawful**

Petitioner's argument that the General Assembly's delegation of authority to the Department of Transportation to promulgate rules regarding punishment was unlawful because adequate standards were not provided was overruled. The argument had already been rejected by the Supreme Court in 343 N.C. 303.

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**2. Administrative Law— Department of Transportation—bill-board permit revocation—insufficient connection between cutting vegetation and billboard**

The superior court erred in granting summary judgment in favor of the Department of Transportation (DOT) in an action concerning the revocation of petitioner's billboard permit. The DOT's final agency decision failed to show a sufficient connection between the cutting of vegetation by agents or employees of petitioner's son and the erection or maintenance of the billboard.

**3. Appeal and Error— preservation of issues—failure to raise constitutional issue at trial**

Petitioner's argument that the Department of Transportation's revocation of his billboard permit violated his due process rights was dismissed where petitioner failed to raise the constitutional issue at trial.

**4. Administrative Law— Department of Transportation—bill-board permit revocation—insufficient connection between persons who cut vegetation and petitioner**

The superior court erred in granting summary judgment in favor of the Department of Transportation (DOT) in an action concerning the revocation of petitioner's billboard permit. The DOT failed to show a sufficient connection between those persons who cut the vegetation and petitioner.

Appeal by petitioner from judgment entered 11 January 2010 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 2 November 2010.

*Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Craig D. Justus, for petitioner-appellant.*

*Attorney General Roy Cooper, by Assistant Attorney General Ebony J. Pittman, for respondent-appellee North Carolina Department of Transportation.*

BRYANT, Judge.

Where adequate standards are provided, the General Assembly's delegation of authority to the Department of Transportation ("DOT")

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to promulgate rules regulating outdoor advertising is not unlawful. Where a party does not raise his constitutional arguments in the trial court, they will not be considered on appeal. However, where DOT's final agency decision fails to show a sufficient connection between those persons who violated its rules and the petitioner whose permit was revoked, the superior court errs in granting summary judgment to DOT. Further, where a superior court's decision to affirm a final agency decision following de novo review is based on an unsupported finding of DOT, it is error.

*Facts*

Respondent DOT has responsibility for maintaining right of way areas alongside our State's interstate highways. Petitioner Walter Powell, Sr., is the owner of an outdoor advertising sign, or billboard, located on his approximately twenty-seven acre property along Interstate 95 in Johnston County, North Carolina. In 2004, petitioner obtained a permit to erect a billboard on the property and, thereafter, constructed same in compliance with all state and local regulations. Petitioner's property is also the site of Big Boy's Truck Stop, a business operated by WLP Enterprises, Inc., a North Carolina corporation in which petitioner is the sole shareholder. Petitioner's son, Walter Powell, Jr., is an employee of the truck stop, managing its day-to-day operations. The billboard on petitioner's property does not advertise the truck stop and has no connection to it other than being located on the same piece of property. Neither the truck stop nor Powell, Jr., has any rights or responsibilities for the use or maintenance of the billboard.

In April 2007, Powell, Jr., on behalf of the truck stop, hired a contractor to clear brush from various parts of the property, including thick vines and saplings on DOT's right of way along a bank below I-95, in order to improve the truck stop's visibility to passing motorists. The brush clearing was not related to the billboard and petitioner was not aware of its taking place. On 25 April 2007, DOT employee Ted Sherrod saw the contractors clearing brush and, after determining Powell, Jr., had hired them, called Powell, Jr., and informed him that this was a violation of DOT rules. By letter of 24 May 2007, DOT sent petitioner a notice of violation relating to alleged "illegal destruction of trees, vegetation and control access fencing located on the state-owned right of way[.]". Powell, Jr., responded on behalf of the truck stop, taking responsibility for the cutting and offering to pay for any damages. By letter dated 21 December 2007,

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DOT revoked petitioner's billboard permit citing Title 19A of the North Carolina Administrative Code Rule 2E .0210(11), which provides a permit shall be revoked when there has been destruction of vegetation on a state-owned right of way without DOT permission that

was conducted by one of more of the following: the sign owner, the permit holder, the lessee or advertiser employing the sign, the owner of the property upon which the sign is located, or any of their employees, agents, assigns, including, but not limited to, independent contractors hired by the permit holder/sign owner, the lessee/agents or advertiser employing the sign, or the owner of the property upon which the sign is located[.]

19A N.C.A.C. 2E.0210(11)(c) (2009). Petitioner pursued an administrative appeal, arguing that he was unaware of the actions of his son and did not in any way authorize the brush clearing. On 22 May 2008, DOT issued a final agency decision affirming the revocation of petitioner's permit. Petitioner then sought judicial review in Wake County Superior Court. On 4 December 2009, DOT moved for summary judgment, and the parties stipulated that petitioner orally moved for the same in open court at the 14 December 2009 hearing on DOT's motion. By order entered 11 January 2010, the superior court denied petitioner's motion for summary judgment, granted DOT's motion for summary judgment, and affirmed DOT's final agency decision revoking petitioner's permit. Petitioner appeals.

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On appeal, petitioner contends that the trial court erred in denying summary judgment to him and granting summary judgment to respondent. In support of this contention, petitioner presents five arguments: (I) any delegation of punishment authority by the General Assembly to DOT was unlawful, (II) DOT acted in excess of its statutory authority, (III) revocation of petitioner's permit violated his Due Process rights, (IV) DOT did not follow 19A N.C. Admin. Code 2E.0210(11), and (V) DOT's action was arbitrary and capricious as a matter of law.

*Standards of Review*

Article 11 of Chapter 136 of the North Carolina General Statutes is entitled the Outdoor Advertising Control Act ("OACA") and governs various matters related to billboards. Section 136-134.1 sets forth the procedures for judicial review by persons aggrieved by a final agency decision under the OACA issued by DOT through the Secretary of Transportation.

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Under G.S. § 136-134.1 . . . , an appellant from the decision and order of the Department of Transportation has the right to a hearing *de novo* in the Superior Court of Wake County; therefore, appellant is not limited to the administrative record.

Although the scope of review *de novo* is broad, the superior court may take action only if the agency decision is (1) [i]n violation of constitutional provisions; or (2) not made in accordance with [the OACA or the regulations thereunder]; or (3) affected by other error of law. Thus, the superior court has the implied power to reverse when the evidence does not support the decision.

*Ace-Hi, Inc. v. Department of Transp.*, 70 N.C. App. 214, 216, 319 S.E.2d 294, 296 (1984) (internal quotation marks and citations omitted). Thus, the superior court is not bound by the agency's findings of fact and conclusions of law and may reach a different conclusion based upon the same evidence. *Appalachian Poster Adv. Co. v. Bradshaw*, 65 N.C. App. 117, 120, 308 S.E.2d 764, 766 (1983).

On appeal from a grant of summary judgment by the superior court under the OACA,

this Court must review the whole record to determine (1) whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) whether the moving party is entitled to judgment as a matter of law.

*Capital Outdoor, Inc. v. Tolson*, 159 N.C. App. 55, 58, 582 S.E.2d 717, 720 (citation omitted), *disc. review denied*, 357 N.C. 504, 587 S.E.2d 662 (2003).

*I*

[1] Petitioner argues that the General Assembly's delegation of authority to DOT to promulgate rules regarding punishment was unlawful because adequate standards were not provided. We disagree.

In a dissent adopted by the Supreme Court, this argument by petitioner has already been rejected:

Specifically, [the] petitioner contends the General Assembly failed to set forth sufficient standards for the control of billboards by which [DOT] may be guided in adopting the rules and regulations in question. [sic] I do not agree.

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The process of determining whether an act unconstitutionally delegates authority to an agency was set forth in explicit detail by Justice Huskins for our Supreme Court in *Adams v. Dept. of N.E.R.*, 295 N.C. 683, 696-98, 249 S.E.2d 402, 410-11 (1978). Without repeating all the criteria there, I simply note that “the primary sources of legislative guidance” are “the declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers.” *Id.*, 295 N.C. at 698, 249 S.E.2d at 411. The declaration of policy for the Outdoor Advertising Control Act is found in N.C.G.S. section 136-127 (1993):

The General Assembly hereby finds and declares that outdoor advertising is a legitimate commercial use of private property adjacent to roads and highways but that the erection and maintenance of outdoor advertising signs and devices in areas in the vicinity of the right-of-way of the interstate and primary highways within the State should be controlled and regulated in order to promote the safety, health, welfare and convenience and enjoyment of travel on and protection of the public investment in highways within the State, to prevent unreasonable distraction of operators of motor vehicles and to prevent interference with the effectiveness of traffic regulations and to promote safety on the highways, to attract tourists and promote the prosperity, economic well-being and general welfare of the State, and to preserve and enhance the natural scenic beauty of the highways and areas in the vicinity of the State highways and to promote the reasonable, orderly and effective display of such signs, displays and devices. *It is the intention of the General Assembly to provide and declare herein a public policy a statutory basis for the regulation and control of outdoor advertising.*

(Emphasis added). The section of the General Statutes following § 136-127 provides for limitation of outdoor advertising devices (§ 136-129); limitations of advertising beyond 660 feet (§ 136-129.1); limitations of advertising adjacent to scenic highways, State and National Parks, and historic areas (§ 136-129.2); removal of existing non-conforming advertising (§ 136-131); a permitting process (§ 136-133); and judicial review of final administrative decisions (§ 136-134.1). Further, N.C.Gen.Stat. [sic] § 136-130 specifically authorizes the Department to promulgate rules and regulations governing §§ 136-129, -129.1, -129.2 and -133.

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The declarations of findings and goals set forth in § 136-127 and the provisions of the sections referenced above are as specific as reason requires and give adequate guidance to the Department in implementing its delegated powers. I would find these regulations a rational, reasonable and constitutional delegation of legislative power.

*Appalachian Poster Adv. Co. v. Harrington*, 120 N.C. App. 72, 83-84, 460 S.E.2d 887, 893 (1995) (Lewis, J. dissenting), *reversed and remanded for the reasons stated in the dissent*, 343 N.C. 303, 469 S.E.2d 554 (1996) (per curiam). Thus, petitioner's argument is overruled.

*II*

[2] Petitioner also argues that the superior court erred in granting summary judgment to DOT because the agency exceeded its statutory authority in revoking his permit for actions unrelated to his billboard. Specifically, petitioner asserts that there is not a sufficient nexus between billboard erection and maintenance and the clearing of vegetation from the right of way here to allow DOT authority to revoke its permit. We reject petitioner's argument that DOT cannot under any circumstance revoke permits for the destruction of vegetation on its right of way. However, we agree that summary judgment for DOT was not proper here.

"In construing the laws creating and empowering administrative agencies, as in any area of law, the primary function of a court is to ensure that the purpose of the Legislature in enacting the law, sometimes referred to as legislative intent, is accomplished." *State ex rel. Comr. of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561, *reh'ing denied*, 301 N.C. 107, 273 S.E.2d 300 (1980). "The best indicia of that legislative purpose are the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Id.* (internal quotation marks and citation omitted). The General Assembly has made clear its intent in enacting the OACA:

The General Assembly hereby finds and declares that outdoor advertising is a legitimate commercial use of private property adjacent to roads and highways but that the erection and maintenance of outdoor advertising signs and devices in areas in the vicinity of the right-of-way of the interstate and primary highway systems within the State should be controlled and regulated in order to promote the safety, health, welfare and convenience and enjoyment of travel on and protection of the public investment in

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highways within the State, to prevent unreasonable distraction of operators of motor vehicles and to prevent interference with the effectiveness of traffic regulations and to promote safety on the highways, to attract tourists and promote the prosperity, economic well-being and general welfare of the State, and to preserve and enhance the natural scenic beauty of the highways and areas in the vicinity of the State highways and to promote the reasonable, orderly and effective display of such signs, displays and devices. *It is the intention of the General Assembly to provide and declare herein a public policy and statutory basis for the regulation and control of outdoor advertising.*

N.C. Gen. Stat. § 136-127 (2009) (emphasis added). The OACA specifically provides DOT with the authority to promulgate rules and regulations concerning:

(1) outdoor advertising signs along the right-of-way of interstate or primary highways in this State; (2) “the specific requirements and procedures for obtaining a permit for outdoor advertising as required in [N.C. Gen. Stat.] § 136-133”; and (3) “for the administrative procedures for appealing a decision at the agency level to refuse to grant or in revoking a permit previously issued.”

*Nat. Adv. Co. v. Bradshaw*, 48 N.C. App. 10, 16-17, 268 S.E.2d 816, 820, (quoting N.C. Gen. Stat. § 136-130) (internal quotation marks omitted) *appeal dismissed and disc. review denied*, 301 N.C. 400, 273 S.E.2d 446 (1980). Section 136-133 governs the permit at issue here and provides, in pertinent part:

No person shall erect or maintain any outdoor advertising within 660 feet of the nearest edge of the right-of-way of the interstate or primary highway system, . . . , without first obtaining a permit from the Department of Transportation or its agents pursuant to the procedures set out by rules adopted by the Department of Transportation. *The permit shall be valid until revoked for non-conformance with this Article or rules adopted by the Department of Transportation.*

N.C. Gen. Stat. § 136-133(a) (2009) (emphasis added). Thus, DOT’s authority under the OACA is no more and no less than regulation and control of outdoor advertising, including controlling permits for the erection and maintenance of billboards.

Under this grant of authority from the General Assembly, DOT has enacted various agency rules governing billboard permit

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procedures. Relevant to this appeal, Rule 2E.0210 covers revocation of previously issued billboard permits on various grounds and provides:

The appropriate district engineer shall revoke a permit for a lawful outdoor advertising structure based on any of the following:

(1) mistake of facts by the issuing District Engineer for which had the correct facts been known, he would not have issued the outdoor advertising permit;

(2) misrepresentations of any facts made by the permit holder/sign owner and on which the District Engineer relied in approving the outdoor advertising permit application;

(3) misrepresentation of facts to any regulatory authority with jurisdiction over the sign by the permit holder/sign owner, the permit applicant or the owner of property on which the outdoor advertising structure is located;

(4) failure to pay annual renewal fees or provide the documentation requested under Rule .0207(c) of this Section;

(5) failure to construct the outdoor advertising structure except all sign faces within 180 days from the date of issuance of the outdoor advertising permit;

(6) a determination upon initial inspection of a newly erected outdoor advertising structure that it fails to comply with the Outdoor Advertising Control Act or the rules in this Section;

(7) any alteration of an outdoor advertising structure for which a permit has previously been issued which would cause that outdoor advertising structure to fail to comply with the provisions of the Outdoor Advertising Control Act or the rules adopted by the Board of Transportation pursuant thereto;

(8) alterations to a nonconforming sign or a sign conforming by virtue of the grandfather clause other than reasonable repair and maintenance as defined in Rule .0225(c). For purposes of this subsection, alterations include, but are not limited to:

(a) enlarging a dimension of the sign facing, or raising the height of the sign;

(b) changing the material of the sign structure's support;

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(c) adding a pole or poles; or

(d) adding illumination;

(9) failure to affix the emblem within as required by [Rule] .0208 of this Section or failure to maintain the emblem so that it is visible and readable from the main-traveled way or controlled route;

(10) failure to affix the name of the person, firm, or corporation owning or maintaining the outdoor advertising sign to the sign structure in sufficient size to be clearly visible as required by [Rule] .0208 of this Section;

*(11) destruction or cutting of trees, shrubs or other vegetation located on the state-owned or maintained right of way where an investigation by the Department of Transportation reveals that the destruction or cutting:**(a) occurred on the state-owned or maintained right of way within 500 feet on either side of the sign location along the edge of pavement of the main traveled way of the nearest controlled route;**(b) was conducted by a person or persons other than the Department of Transportation or its authorized agents or assigns, or without permission from the Department of Transportation; and**(c) was conducted by one or more of the following: the sign owner, the permit holder, the lessee or advertiser employing the sign, the owner of the property upon which the sign is located, or any of their employees, agents or assigns, including, but not limited to, independent contractors hired by the permit holder/sign owner, the lessee/agents or advertiser employing the sign, or the owner of the property upon which the sign is located;*

(12) unlawful use of a controlled access facility for purposes of repairing, maintaining or servicing an outdoor advertising sign where an investigation reveals that the unlawful violation:

(a) was conducted actually or by design by the sign owner/permit holder, the lessee or advertiser employing the sign, the owner of the property upon which the sign is located, or any of their employees, agents, or assigns, including,

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but not limited to, independent contractors hired by any of the above persons; and,

(b) involved the use of highway right of way for the purpose of repairing, servicing, or maintaining a sign including stopping, parking, or leaving any vehicle whether attended or unattended, on any part or portion of the right of way; or

(c) involved crossing the control of access fence to reach the sign structure;

(13) maintaining a blank sign for a period of 12 consecutive months;

(14) maintaining an abandoned, dilapidated, or discontinued sign;

(15) a sign that has been destroyed or significantly damaged as determined by [Rules] .0201(8) and (29) of this Section;

(16) moving or relocating a nonconforming sign or a sign conforming by virtue of the grandfather clause which changes the location of the sign as determined by [Rule] .0201(27) of this Section;

(17) failure to erect, maintain, or alter an outdoor advertising sign structure in accordance with the North Carolina Outdoor Advertising Control Act, codified in G.S. 136, Article 11, and the rules adopted by the Board of Transportation.

19A N.C.A.C. 2E.0210 (emphasis added).

Petitioner's permit was revoked for a violation under subsection (11) based on the destruction of vegetation on the right of way. We note that subsection 11, unlike each of the other grounds for revocation listed, does not specify any connection between the permitted billboard and the act or omission constituting a violation except for proximity (i.e., the vegetation cut must be "within 500 feet on either side of the sign location along the edge of pavement of the main traveled" road). One could imagine that in some factual circumstances, the destruction of vegetation within 500 feet of a permitted billboard would be related to the erection and maintenance of the billboard. For example, cutting trees on the right of way might make the billboard more visible to passing motorists. Cutting overgrown brush or vines near a billboard might facilitate workers' ability to access the billboard for repair or maintenance purposes. Such actions by the persons listed in subsection 11(c) would provide a

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connection between violation of DOT's rule and the regulation and control of billboards. Indeed, DOT has chosen to make such a connection explicit in Rule 2E.0211, which governs denial of billboard permits for, *inter alia*, cutting of vegetation on the DOT right of way. Rule 2E.0211 requires a link between the cutting and billboard visibility in denying permits for new signs:

(1) for a period of five years where the unlawful destruction or illegal cutting of vegetation has occurred within 500 feet on either side of the proposed sign location, and as measured along the edge of pavement of the main traveled way of the nearest controlled route. For purposes of this paragraph only:

(A) "Unlawful destruction or illegal cutting" is the destruction or cutting of trees, shrubs, or other vegetation on the state-owned or maintained right of way which was conducted by a person or persons other than the Department of Transportation or its authorized agents or without the permission of the Department of Transportation;

(B) *The Department of Transportation's investigation shall reveal some evidence that the unlawful destruction or illegal cutting would create, increase, or improve a view to a proposed outdoor advertising sign from the main-traveled way of the nearest controlled route;*

19A N.C.A.C. 2E.0211(c) (emphasis added).

Here, the final agency decision does not contain any finding of fact showing a connection between the destruction of vegetation and the billboard. Without such a finding, DOT fails to show that its action was within the scope of its authority under the OACA. In its amended petition for judicial review in superior court, petitioner specifically raised this issue, contending that any destruction of vegetation did not improve visibility of the billboard and was not connected to the use or maintenance of the billboard.

Our review reveals no evidence in the record that could support a finding of a connection between the cutting of vegetation by agents or employees of petitioner's son and the erection or maintenance of the billboard. In his deposition, DOT District Engineer Tim Little stated that there was no evidence that the cutting improved visibility of the billboard or had any connection to its maintenance. Petitioner also submitted an affidavit from Jason Pope, owner of a nursery and landscaping business, which states that Pope is familiar with the

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vegetation cut and is of the opinion that the cutting did not improve the billboard's visibility. Thus, the superior court erred in granting summary judgment to DOT, and we reverse and remand for further proceedings in superior court. As part of its de novo hearing, the superior court is not bound by the administrative record and is free to make its own findings and conclusions as necessary to carry out its statutory directive to determine whether the DOT decision was "(1) [i]n violation of constitutional provisions; or (2) [n]ot made in accordance with [the OACA or the regulations thereunder]; or (3) [a]ffected by other error of law." N.C. Gen. Stat. § 136-134.1.

*III*

**[3]** Petitioner also argues the revocation of his permit violated his due process rights. We dismiss petitioner's argument.

In his brief to this Court, petitioner contends that his due process rights under the United States and North Carolina constitutions were violated because he is being punished for the acts of others. However, in his amended petition for judicial review filed in August 2008, petitioner raised due process claims "based upon no adequate standards to protect against arbitrary and unreasoned decisions in administering" DOT's rules under OACA. Thus, petitioner did not give the superior court the opportunity to consider and rule on the specific constitutional argument he now attempts to bring before this Court. "A constitutional issue not raised at trial will generally not be considered for the first time on appeal." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam) (citation omitted). This argument is dismissed.

Further, we note that, in order to revoke a permit for violations under the OACA, "DOT must (1) clearly identify persons, (2) who committed a violation for which revocation is permissible, and (3) show a sufficient connection between those persons and the permit holder." *Whiteco Industries, Inc. v. Harrelson*, 111 N.C. App. 815, 820, 434 S.E.2d 229, 233 (1993) (citation omitted), *appeal dismissed and disc. review denied*, 335 N.C. 566, 441 S.E.2d 135 (1994). Thus, even had petitioner properly brought this issue forward on appeal, both DOT's rules and this Court's caselaw would ensure that his permit could only be revoked for actions of persons sufficiently connected to him. We address this argument as part of petitioner's issue IV below.

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**IV**

**[4]** Petitioner next argues that the superior court erred in granting summary judgment to DOT because that agency failed to prove that vegetation on the right of way was cut by any party covered in Rule 2E.0210. We agree.

Rule 2E.0210 requires a permit be revoked for destruction of vegetation on the DOT right of way when the action

was conducted by one of more of the following: the sign owner, the permit holder, the lessee or advertiser employing the sign, the owner of the property upon which the sign is located, or any of their employees, agents, assigns, including, but not limited to, independent contractors hired by the permit holder/sign owner, the lessee/agents or advertiser employing the sign, or the owner of the property upon which the sign is located[.]

19A N.C.A.C. 2E.0210(11)(c). In determining whether there has been a violation of an outdoor advertising regulation sufficient to support a permit revocation, this Court has held “DOT must (1) clearly identify persons, (2) who committed a violation for which revocation is permissible, and (3) show a sufficient connection between those persons and the permit holder.” *Whiteco Industries, Inc.*, 111 N.C. App. at 820, 434 S.E.2d at 233. Our review of the final agency decision indicates that DOT failed to comply with the third requirement under *Whiteco Industries, Inc.*, because a crucial finding of fact is not supported by competent evidence. Finding of fact 1 in DOT’s final agency decision states, in pertinent part, “Mr. Walter Powell, [sic] owns an outdoor advertising structure located adjacent to I-95 at mile marker [sic] in Johnston County.” This finding is fully supported by evidence in the record. However, finding of fact 5 states:

In response to the Notice of Violation, Mr. Powell wrote a letter to District Engineer Little dated May 31, 2008 wherein he admitted to hiring persons to cut vegetation on State[-]owned property, accepted responsibility for “destruction of the vegetation” and acknowledged being aware of “guidelines” for vegetation removal. (Exhibit C)

This finding of fact is not supported by any evidence in the record, as revealed by examination of the letter in question. Exhibit C is a letter written *not* by petitioner Walter Powell, Sr., permit holder and the “Mr. Powell” referred to in finding of fact 5, but by his son, Walter Powell, Jr. Powell, Jr., is the only party who has acknowledged any

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responsibility for hiring the contractors who cut the vegetation in question. The final agency decision makes no reference to Powell, Jr., and does not connect him or his decision to order cutting of vegetation to his father, petitioner. It appears that DOT may have been acting under the mistaken belief that petitioner, rather than his son, had acknowledged ordering the vegetation to be cut. Because DOT made no finding that the destruction of vegetation was performed or ordered by a person listed in or subject to Rule 2E.0210(11), the agency failed to “show a sufficient connection between those persons [who cut the vegetation] and the permit holder.” *Id.*

As previously noted, in its de novo review, the superior court is not bound by the agency’s findings and conclusions but may reach a different conclusion based upon the same evidence. *Appalachian Poster Adv. Co.*, 65 N.C. App. at 120, 308 S.E.2d at 766. Here, no evidence in the record supported DOT’s finding of fact 5. Yet, “[r]ather than make or order new findings, however, the trial court granted summary judgment to [] DOT. It ruled that [] DOT was ‘entitled to a judgment as a matter of law [and upheld the decision of DOT],’ which decision and order contained the unsupported finding.” *Ace-Hi, Inc.*, 70 N.C. App. at 216-17, 319 S.E.2d at 296. A superior court’s decision to affirm an agency decision based on unsupported findings of DOT is error. *Id.* at 217, 319 S.E.2d at 296.

Because the superior court erred in granting summary judgment to DOT, we reverse and remand for further proceedings in the superior court. As part of its de novo hearing, the superior court is not bound by the administrative record and is free to make its own findings and conclusions as necessary to carry out its statutory directive to determine whether the DOT decision was “(1) [i]n violation of constitutional provisions; or (2) [n]ot made in accordance with [the OACA or the regulations thereunder]; or (3) [a]ffected by other error of law.” N.C.G.S. § 136-134.1.

## V

Petitioner also argues that DOT’s revocation of his permit was arbitrary and capricious. Because we reverse and remand as discussed *supra*, we need not address this argument.

Reversed and remanded.

Judges STROUD and BEASLEY concur.

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MONA COUSART, INDIVIDUALLY AND AS THE GUARDIAN FOR MINOR CARMEN COUSART, AND CAMERON COUSART, PLAINTIFFS V. THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, CAROLINAS PHYSICIANS NETWORK, INC., CHARLOTTE OBSTETRICS AND GYNECOLOGIC ASSOCIATES, P.A., JOINTLY AND SEVERALLY, DEFENDANTS

No. COA09-477

(Filed 18 January 2011)

**Medical Malpractice— proximate cause—expert's testimony contradictory—summary judgment**

The trial court did not err by granting summary judgment for defendants in a medical malpractice action where plaintiffs did not forecast evidence showing proximate cause. There were conflicts between the deposition and affidavits of plaintiffs' expert that left the trial court with an issue of credibility, not a genuine issue of material fact.

Appeal by Plaintiffs from order and judgment dated 1 December 2008 by Judge David S. Cayer in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 October 2009.

*Charles G. Monnett III & Associates, by Randall J. Phillips, for Plaintiff-Appellants.*

*Parker Poe Adams & Bernstein LLP, by Harold D. "Chip" Holmes, Jr., John H. Beyer, and Leigh K. Hickman, for Defendant-Appellees.*

BEASLEY, Judge.

Mona Cousart (Plaintiff Mona), as the guardian for minor Carmen Cousart (Plaintiff Carmen), and Cameron Cousart (Plaintiff Cameron), (collectively Plaintiffs), appeal from an “order and judgment” granting summary judgment in favor of The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center (CMC), Carolinas Physicians Network, Inc. (Carolinas Physicians), and Charlotte Obstetrics and Gynecologic Associates, P.A. (Charlotte OB-GYN) (collectively Defendants) and dismissing Plaintiffs’ claims, including four counts of medical negligence and a loss of consortium claim by Plaintiff Cameron, with prejudice. The dispositive question in this case is whether there is an issue of material fact concerning proximate causation. Because Plaintiffs’ expert witness provided affidavits that contradicted his deposition testimony and are therefore

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insufficient to establish that any breaches in the standard of care caused the injuries complained of, and lacking any other expert testimony on this essential element, we affirm the trial court's ruling.

### I. Background

Plaintiffs filed a complaint dated 17 January 2007 against Defendants, seeking redress for medical negligence and alleging the following facts. On 23 September 2003, Plaintiff Mona was admitted to CMC to give birth to Plaintiff Carmen. Plaintiff Mona was in labor when Leslie Hansen-Lindner, M.D., (Dr. Hansen-Lindner), an obstetrician and gynecologist employed with Charlotte OB-GYN and Carolinas Physicians and an agent of CMC, arrived and instructed Plaintiff Mona "to push to deliver the baby." After several minutes of pushing, Plaintiff Mona was having difficulty in delivering Plaintiff Carmen. The complaint further alleges that CMC nurses and Dr. Hansen-Lindner applied fundal pressure on Plaintiff Mona to facilitate delivery of the baby. Dr. Hansen-Lindner, in an attempt to extract Plaintiff Carmen, allegedly placed a Kiwi vacuum on Plaintiff Carmen's head, but the baby's shoulders became lodged in the birth canal. Dr. Hansen-Lindner then applied traction, pulling, rotation, or other mechanical forces to the head and body of Plaintiff Carmen, which resulted in delivery. However, Plaintiff Carmen sustained a brachial plexus/shoulder dystocia injury to her right arm, which Plaintiffs contend was the result of excessive forces applied during the complicated delivery.

Plaintiffs' complaint made a number of allegations of negligence on the part of Dr. Hansen-Lindner and other unnamed nurses and medical staff who assisted her, as employees or agents of Defendants<sup>1</sup> Plaintiffs' primary allegations of negligence which are relevant for purposes of this opinion were that Dr. Hansen-Lindner and/or unnamed medical or nursing personnel of Defendants were negligent in the following ways: telling Plaintiff Mona to push to deliver Plaintiff Carmen; applying fundal pressure to facilitate delivery; pulling Plaintiff Carmen down the birth canal with the vacuum extractor until her shoulders became lodged in the birth canal; applying excessive

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1. At the summary judgment hearing, Plaintiffs' counsel stated in open court that Plaintiffs were not pursuing allegations of negligence as to Defendants' medical treatment of Plaintiff Mona which resulted in injuries to Plaintiff Mona, which would include Plaintiff Cameron's claim for loss of consortium. Plaintiffs have also not assigned error related to Plaintiff Cameron's claim for loss of consortium in the record on appeal, and no argument was brought forth in Plaintiffs' brief on appeal. This claim is thus deemed abandoned. *See* N.C.R. App. P. 28(b)(6).

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traction, pulling, rotation or other mechanical forces to the head and body of Plaintiff Carmen in order to facilitate delivery; failing to properly perform rotational maneuvers for delivering Plaintiff Carmen; failing to recognize the warning signs that Plaintiff Mona's baby would be large; failing to perform adequate ultrasounds; failing to adequately monitor fetal growth; failing to recognize the signs and symptoms of the risk of shoulder dystocia; failing to perform a Caesarean section after it became apparent the labor had stalled and vaginal delivery would not be safe for Plaintiffs Mona and Carmen; failing to use reasonable care and diligence in the treatment of Plaintiffs Mona and Carmen; and failing to practice within the standard of care for an obstetrician in the same or similar community. Plaintiffs alleged that these acts of negligence by Dr. Hansen-Lindner and/or unnamed medical or nursing personnel of Defendants proximately caused Plaintiff Carmen's injuries and have resulted in pain and suffering and medical costs and will require additional medical treatment throughout her life.

On 7 March 2007, Defendants filed an answer, wherein they denied negligence and moved to dismiss the complaint due to Plaintiffs' failure to comply with the requirements of N.C. Gen. Stat. § 1A-1, Rule 9(j). Defendants' answer also included a motion to dismiss the complaint for insufficiency of process and insufficiency of service of process pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(4) and (5) respectively. On 10 August 2007, the trial court entered a discovery scheduling order, setting forth a schedule for the designation of expert witnesses and the completion of discovery for trial. Depositions of the following witnesses were taken: Leslie Hansen-Lindner, M.D.; William MacDonald, M.D.; Robert Wicker, M.D.; Maureen Nelson, M.D.; Ashley Proctor, R.N.; and Amy Petty, R.N. On 14 January 2008, pursuant to the discovery scheduling order, Plaintiffs designated the expert witnesses whom they were likely to call to testify at trial: Martin A. Allen, M.D., a board-certified obstetrician and gynecologist in Lexington, North Carolina; Linda Peterson Walls, R.N., a registered nurse experienced in the fields of labor and delivery; and Anthony M. Gamboa, Jr., Ph.D., M.B.A., an economist expected to offer opinions as to Plaintiff Carmen's vocational impairment. Dr. Allen, Ms. Walls, and Dr. Gamboa were deposed on 18 April 2008, 16 April 2008, and 19 May 2008, respectively. Defendants' expert witnesses, Sandra K. Rayburn, R.N., Ph.D. and Robert K. DeMott, M.D., were deposed on 28 August 2008 and 3 September 2008, respectively.

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On 14 October 2008, Defendants filed a motion for summary judgment, which was heard on 20 November 2008. By order dated 1 December 2008, the trial court granted Defendants' motion for summary judgment and dismissed all of Plaintiffs' claims with prejudice. Plaintiffs filed notice of appeal on 29 December 2008.

**II. Standard of Review**

Plaintiffs appeal from the order granting summary judgment in favor of Defendants and dismissing Plaintiffs' complaint in its entirety.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). A trial court's grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party.

*Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007). Upon a motion for summary judgment, "[t]he moving party carries the burden of establishing the lack of any triable issue . . . and may meet his or her burden by proving that an essential element of the opposing party's claim is nonexistent[.]" *Lord v. Beerman*, 191 N.C. App. 290, 293, 664 S.E.2d 331, 334 (2008) (internal quotation marks and citation omitted). If met, the burden shifts to the nonmovant to produce a forecast of specific evidence of its ability to make a *prima facie* case, *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003), *aff'd per curiam*, 358 N.C. 137, 591 S.E.2d 520 (2004), which requires medical malpractice plaintiffs to prove, in part, that the treatment caused the injury. Not only must it meet our courts' definition of proximate cause, but evidence connecting medical negligence to injury also "must be probable, not merely a remote possibility." *White v. Hunsinger*, 88 N.C. App. 382, 387, 363 S.E.2d 203, 206 (1988).

**III. Discussion**

In their sole argument on appeal, Plaintiffs contend that "the trial court committed reversible error when it allowed Defendants' motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56" because expert witness deposition testimony established proximate causation of the injury to Plaintiff Carmen. We disagree.

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A medical negligence plaintiff must offer evidence that establishes the following essential elements: “(1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff.” *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006) (internal quotation marks and citation omitted). This Court has defined proximate cause as

“a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff’s injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.”

*Williamson v. Liptzin*, 141 N.C. App. 1, 10, 539 S.E.2d 313, 319 (2000) (quoting *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984)) (citation omitted). Whether medical negligence plaintiffs can show causation depends on experts. *See Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 371, 663 S.E.2d 450, 453 (2008), *disc. review denied*, 363 N.C. 372, 678 S.E.2d 232 (2009). For, expert opinion testimony is required to establish proximate causation of the injury in medical malpractice actions. *See Smithers v. Collins*, 52 N.C. App. 255, 260, 278 S.E.2d 286, 289 (1981) (noting that in many medical negligence cases “there is a requirement that expert testimony is needed to establish the standard of care and the proximate cause of the plaintiff’s injury” because such expert testimony is generally necessary “when the standard of care and proximate cause are matters involving highly specialized knowledge beyond the ken of laymen”). While proximate cause is often a factual question for the jury, evidence “based merely upon speculation and conjecture . . . is no different than a layman’s opinion, and as such, is not sufficiently reliable to be considered competent evidence on issues of medical causation.” *Gaines v. Cumberland County Hosp. Sys., Inc.*, — N.C. App. —, —, 692 S.E.2d 119, 123 (2010) (internal quotation marks and citation omitted); *see also Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000) (“[Our Supreme] Court has specifically held that an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility.” (internal quotation marks omitted)).

Thus, Plaintiffs must be able to make a *prima facie* case of medical negligence at trial, which includes articulating proximate cause with

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specific facts couched in terms of probabilities. However, it is well-established that “a party opposing a motion for summary judgment cannot create a genuine issue of material fact by filing an affidavit contradicting his prior sworn testimony.” *Pinczkowski v. Norfolk S. Ry. Co.*, 153 N.C. App. 435, 440, 571 S.E.2d 4, 7 (2002) (citations omitted); *see also Carter v. West Am. Ins. Co.*, 190 N.C. App. 532, 539, 661 S.E.2d 264, 270 (2008) (“A non-moving party cannot create an issue of fact to defeat summary judgment simply by filing an affidavit contradicting his prior sworn testimony.” (internal quotation marks omitted)). While Plaintiffs contend that the affidavits of expert witness Dr. Allen were sufficient to survive summary judgment on the issue of proximate cause, Defendants contend that Dr. Allen’s affidavits do not create a genuine issue of material fact with respect to proximate cause because his deposition testimony contradicts his affidavits and the affidavits should not be considered.<sup>2</sup> As further discussed below, because of this rule regarding contradictory testimony, we agree with Defendants that the expert opinions offered by Plaintiff regarding the standard of care and causation—in the form of the two affidavits from Dr. Allen—are insufficient to demonstrate proximate causation.

Plaintiffs submitted two affidavits from Dr. Allen: the first, dated 18 December 2006, addressed his qualifications as an expert witness and his summary opinions regarding Plaintiffs’ case, and the second affidavit, dated 18 November 2008, was prepared after Dr. Allen’s deposition. Plaintiffs argue that if Dr. Allen did not establish proximate causation in his deposition testimony, his second affidavit did establish proximate causation. Defendants counter, however, that portions of Dr. Allen’s 18 April 2008 deposition are contrary to statements in his 18 November 2008 affidavit regarding causation; thus, Dr. Allen could not testify that Defendants’ care proximately caused Plaintiffs’ injuries.

During the 18 April 2008 discovery deposition taken by defense counsel, the following testimony was elicited:

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2. We note that Defendants did not file a motion to strike Dr. Allen’s second affidavit. As a general rule, a party’s failure to move to strike an affidavit’s “allegations waives any objection to their formal defects.” *Whitehurst v. Corey*, 88 N.C. App. 746, 748, 364 S.E.2d 728, 729-30 (1988) (stating that “failure to object to form or sufficiency of pleadings and affidavits waives objection on summary judgment” and an “affidavit not conforming to Rule 56(e) is subject to motion to strike,” but objection is waived absent the motion). However, the issues arising from Dr. Allen’s deposition and second affidavit were argued extensively before the trial court at the summary judgment hearing, and Plaintiffs did not contend either before the trial court or before this Court that Defendants should have been required to file a motion to strike the affidavit.

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[Defense Counsel]: You would agree with me that a brachial plexus injury can occur for any number of reasons?

[Dr. Allen]: Correct.

Q.: You would agree with me that a brachial plexus injury can occur in the absence of shoulder dystocia, correct?

A.: It's been reported.

Q.: Would you agree with me that you can't say to any reasonable degree of medical certainty as you sit here today that fundal pressure was actually and truthfully applied in this case, can you?

....

A.: I wasn't there.

Q.: And you can't say to any reasonable degree of medical certainty as you sit here today that if fundal pressure was applied when shoulder dystocia was encountered with this delivery, that it caused the brachial plexus injury, can you?

....

A.: I don't think anybody can say that.

In his 18 November 2008 affidavit, Dr. Allen stated his opinion regarding the causes of Plaintiff Carmen's injuries:

5. Similarly, it was and always has been my opinion that the inappropriate prenatal care and management of labor and delivery by the Defendants more likely than not caused or contributed to the permanent brachial plexus injury sustained by Carmen Cousart.

....

7. When I was asked during my deposition about whether these departures from the standard of care caused Carmen Cousart's brachial plexus injury, I was unable to state whether, for example, fundal pressure was the cause, in and of itself and to the exclusion of other factors. However, if, as has since been clarified to me by counsel, the legal standard is whether these departures from the standard of care were a cause or substantial contributing factor to Carmen's brachial plexus injury, then I am of the opinion that these departures from the standard of care were a cause or contributing factor to Carmen Cousart's brachial plexus injury.

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8. With regard to the use of fundal pressure, it is my opinion, more likely than not, and to a reasonable degree of medical certainty, that under circumstances like those during Mrs. Cousart's delivery of Carmen, the use of fundal pressure would likely increase the degree of shoulder impaction and be a cause or substantial contributing factor to her resulting brachial plexus injury.

The first affidavit made in 2006 mentions causation in only general terms and opines in conclusory fashion that an unidentified "violation of the standard of care was the proximate cause of the injuries." Lacking competent evidence of proximate cause for failure to "point to any specific incident or action of any defendant during [labor and delivery] that would have caused [the injuries]," *Campbell v. Duke Univ. Health Sys.*, — N.C. App. —, —, 691 S.E.2d 31, 37 (2010), this affidavit is also negated by Dr. Allen's detailed deposition testimony of 18 April 2008 recited above. Moreover, his 2008 affidavit, made just two days before the summary judgment hearing, clearly contradicts his deposition. A Fourth Circuit case with similar facts is persuasive. In *Rohrbough v. Wyeth Labs., Inc.*, 916 F.2d 970 (4th Cir. 1990), medical expert Dr. Cox testified on deposition to possible ways that DTP vaccine may cause neurological damage but declined to give an opinion that the defendant's vaccine caused the plaintiff's particular injuries. *Id.* at 974. The Fourth Circuit noted summary judgment would be "unproblematic" if limited to the deposition testimony lacking sufficient proximate cause testimony, but the plaintiffs attached an affidavit to their response to the summary judgment motion, wherein Dr. Cox stated: "It is my opinion that the DPT vaccine administered to [plaintiff] . . . caused the neurological injuries from which she has suffered and continues to suffer." *Id.* at 974-75. While "[t]his statement alone would appear to defeat defendant's motion for summary judgment," the court concluded that "Dr. Cox's affidavit is in such conflict with his earlier deposition testimony that the affidavit should be disregarded as a sham issue of fact" because "[a] genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct." *Id.* at 975 (citation omitted).

Our Court has also addressed whether a party opposing summary judgment can create a genuine issue of fact by filing an affidavit contradicting prior sworn testimony, and answered alike:

[A] party should not be allowed to create an issue of fact in this manner and [we] hold that contradictory testimony contained in

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an affidavit of the nonmovant may not be used by him to defeat a summary judgment motion where the only issue of fact raised by the affidavit is the credibility of the affiant. . . . If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

*Mortgage Co. v. Real Estate, Inc.*, 39 N.C. App. 1, 9-10, 249 S.E.2d 727, 732 (1978) (internal quotation marks omitted). Dr. Allen's second affidavit greatly contradicts his deposition testimony. After detailing various standards and *possible* theories by which breaches thereof *could* cause injuries, Dr. Allen refused, when directly questioned about causation *in this case*, to opine that a causal link existed between any breach and Plaintiff Carmen's symptoms. *Cf. Rohrbough*, 916 F.2d at 975. "Yet months later, when faced with [Defendants'] motion for summary judgment, Dr. [Allen] boldly gave his opinion by way of affidavit that the [inappropriate management of labor and delivery by Defendants] caused the injuries in question." *Id.* Contradicting several assertions he made during deposition on the same subject matter, Dr. Allen's second affidavit cannot be considered.

On deposition, Dr. Allen remained vague, answering, "I wasn't there," and "I don't think anybody can say that," respectively, when asked, to a reasonable degree of medical certainty, whether fundal pressure was actually applied, and if so, whether it caused the injuries alleged. Significantly, Dr. Allen then stated:

[W]hen you tease apart individual pieces of . . . the delivery you can find lots of areas to criticize. *One will never know, one can only speculate, what had to do with what.* In other words, did the fundal pressure cause the brachial plexus injury? *You got no way of knowing. . . .*

What you do know is, is there's some things that happened that *may or may not have contributed*. And *one will never know* if using the vacuum . . . *contributed*. *One will never know if fundal pressure, given or not given, contributed.*

He admitted only that some things should not have happened and "some things that didn't happen . . . should have" but followed: "[D]o any of those things prevent a brachial plexus injury? *You've got no way of knowing.*" When asked if any evidence suggested "application of the Kiwi vacuum *caused or contributed to* the brachial plexus

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injury,” Dr. Allen responded, “[t]here’s no way to do that.” Thus, we distinguish our holding in *Phillips v. Triangle Women’s Health Clinic, Inc.*, 155 N.C. App. 372, 573 S.E.2d 600 (2002), where the plaintiff’s expert testified on deposition that he did not give his opinion over the phone but, in a subsequent affidavit, stated that he did so. See *Phillips*, 155 N.C. App. at 377, 573 S.E.2d at 603 (holding “there was no clear contradiction” in the expert’s deposition and later filed affidavit because he testified in terms of “probabilities,” never denied giving his opinion, and “[a]fter having time to reflect on that conversation,” clarified what he recalled in his subsequent affidavit). To the contrary, Dr. Allen did not testify in terms of probabilities but, rather, affirmed that “no one will ever know” and ruled out any way of knowing the cause of Plaintiff Carmen’s injuries.

The entire deposition shows repeatedly that when questioned directly as to the cause of Plaintiff Carmen’s injuries, Dr. Allen could not opine that a causal link existed between any particular act or omission. Impliedly, any subsequent, purportedly firm opinion by Dr. Allen on causation would not only be conjecture but would also directly belie his testimony that it is virtually impossible to know if the alleged breaches in care proximately caused the injuries sustained. Thus, it is difficult to see how the statement, “it was and always has been my opinion that the inappropriate prenatal care and management of labor and delivery by the Defendants more likely than not caused or contributed to the permanent brachial plexus injury,” in Dr. Allen’s 2008 affidavit does not plainly contradict his deposition. Plaintiff’s argument is based on an unsubstantiated premise that the deposition failed only to assign a *sole* cause while the affidavit pointed to *a* cause or contributing factors. The above-quoted deposition testimony, however, contains not one question framed in terms of “sole cause,” nor did Dr. Allen ever respond accordingly. To the contrary, the record shows that defense counsel employed the phrase “caused or contributed to” at least once and Dr. Allen understood his questions to encompass *a* cause or contributing factor, as reflected by his own use of those terms. Moreover, Plaintiffs’ counsel tried to correct Dr. Allen by asking whether he had the opinion that the breaches of care he had described “were *a* cause or *substantial contributing factor* to the . . . injuries sustained by the baby in this case *compared to the sole cause*.” Dr. Allen relayed the difficulty of knowing if “one factor or several” caused the injuries, and Plaintiffs’ counsel rephrased: “did they alone or in combination form a cause or contributing factor to the injury in this case more likely than not?” Dr.

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Allen reiterated his refusal to articulate an opinion, and *Rohrbough* is again instructive:

The [deposition] questions admittedly were propounded in terms of a somewhat higher standard of proof than plaintiffs must satisfy. . . . Although it stretches the imagination to say that [the expert's] testimony would have been any different had the questions incorporated a differing standard of proof, that is, that she would have given her opinion that the vaccine was the reasonably probable cause in spite of her testimony that she could not determine a cause to a reasonable degree of medical certainty, we need not rely on intuition. The question is not what she would have said, but what she did say . . . .

*Rohrbough*, 916 F.2d at 973.

We acknowledge that Dr. Allen was asked whether fundal pressure, if applied, *caused* the injury and that a question framed in terms of *a* cause or contributing factor would have been more exact. We should not, however, dismiss the expert's intelligence or accept his attestation that his deposition answers were limited to whether each departure from the standard of care "was the cause, in and of itself and to the exclusion of other factors." Dr. Allen was never questioned this way; moreover, the claim in his affidavit that the proper legal standard was only later clarified to him by counsel cannot conceal his own answers on deposition framed in terms of contributing causes. The question is what Dr. Allen did say, and he asserted several times that "one will never know" if the subject breach *contributed* to the injuries.

The conflicts between Dr. Allen's deposition and affidavits, particularly the second one filed to survive summary judgment, leave the trial court with only a credibility issue, not a genuine issue of material fact. For, it is improper to consider the second affidavit, without which, summary judgment becomes "unproblematic." Where Defendants met their burden by negating an essential element of Plaintiffs' proof, Plaintiffs failed to "come forward with competent evidence that raises a genuine issue of material fact on that element." *White*, 88 N.C. App. at 386, 363 S.E.2d at 206. As to causation, no expert, including Dr. Allen, could speak in terms of probabilities or raise more than a conjecture based on speculation, and nothing in their combined testimony differs from a layman's opinion on medical causation. Therefore, no proximate cause evidence submitted by Plaintiffs was sufficiently reliable to be considered competent.

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Because Plaintiffs have failed to forecast any evidence showing proximate cause, leaving the trial court with no genuine issue of material fact, we affirm the trial court's grant of summary judgment for Defendants.

Affirmed.

Judges STEPHENS and STROUD concur.



ANTHONY ROBINSON, CALIZZA WHITAKER, EDITH ROBINSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF SHONDRETTA WHITAKER AND SHONDRETTA WHITAKER, PLAINTIFFS V. BRIDGESTONE/FIRESTONE NORTH AMERICAN TIRE, L.L.C., A FOREIGN CORPORATION, LITTLETON SERVICE CENTER AND LUTHER ALSTON, INDIVIDUALLY AND AS A SERVANT, AGENT, AND EMPLOYEE OF LITTLETON SERVICE CENTER, DEFENDANTS

No. COA09-1108

(Filed 18 January 2011)

**1. Statutes of Limitation and Repose—products liability—policy arguments on fairness**

The trial court did not err by granting summary judgment in favor of defendants based on its determination that plaintiffs' products liabilities claims were barred by the six-year statute of repose under N.C.G.S. § 1-50(a)(6). Plaintiffs' policy arguments attacking the general fairness of the statute should be directed to the General Assembly.

**2. Estoppel—equitable estoppel—assertion of products liability statute of repose**

The trial court did not err by concluding that defendant tire company was not equitably estopped from asserting that plaintiffs' products liability claims were barred by the statute of repose. Plaintiffs failed to point to any evidence showing that they relied on defendant's conduct in delaying the filing of their suit.

Appeal by plaintiffs from orders entered 24 February 2009 by Judge J. Richard Parker in Halifax County Superior Court. Heard in the Court of Appeals 23 February 2010.

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*Angela M. Bullard for plaintiff-appellants.**Young Moore and Henderson, P.A., by David M. Duke and Shannon S. Frankel, for defendant-appellee Bridgestone/Firestone North American Tire, L.L.C.*

GEER, Judge.

Plaintiffs Anthony Robinson; his wife, Edith Robinson; and Ms. Robinson's daughters, Calizza Whitaker and Shondretta Whitaker, appeal from the trial court's grant of summary judgment to defendants Bridgestone/Firestone North American Tire, L.L.C. ("Firestone"), Littleton Service Center ("Littleton"), and Luther Alston based on the court's determination that plaintiffs' products liability claims are barred by the six-year statute of repose set out in N.C. Gen. Stat. § 1-50(a)(6) (2007). In this appeal, plaintiffs attack the general fairness of this statute of repose, including the statute's requirement that plaintiffs bear the burden of proving when the statute of repose began running. The bulk of those arguments are, however, policy arguments that must be directed to the General Assembly. Because plaintiffs have pointed to no evidence in the record to show that their claim is not barred by N.C. Gen. Stat. § 1-50(a)(6), we affirm.

**Facts**

In late May 2002, Anthony Robinson purchased four used automobile tires for \$20.00 each from an unknown man on Highway 48 in Halifax County, North Carolina. A few days later, Mr. Robinson took the tires to Littleton to have them mounted on his 1994 Ford Explorer. Luther Alston was working at Littleton when Mr. Robinson came in. While talking to Mr. Alston, Mr. Robinson decided the tires he had bought were too large to fit the Explorer. Mr. Alston told Mr. Robinson that he had some used tires at home that would fit the vehicle and offered to trade them for Mr. Robinson's tires.

Mr. Alston went to his house, picked up four mismatched tires, brought them back to the store, and gave them to Mr. Robinson in exchange for his used tires. Mr. Robinson took home the set of tires Mr. Alston had brought him. The next day, Ms. Robinson brought the Explorer and the tires back to Littleton and had the tires mounted on the vehicle.

Two days later, on 2 June 2002, the Robinson family—with Ms. Robinson driving—traveled in the Explorer to Rocky Mount to visit

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Ms. Robinson's father. While the family was driving on Interstate 95 at approximately 70 miles per hour, they heard a loud noise and the Explorer began to swerve. As the Explorer swerved to the right, Ms. Robinson steered back to the left, at which point the Explorer struck a guardrail on the left side of the vehicle and rolled over. All four passengers were seriously injured in the accident. Although Mr. and Ms. Robinson and Calizza Whitaker largely recovered from their injuries, Shondretta Whitaker is paralyzed. She relies on a feeding tube, requires 24-hour care, and can only communicate using nonverbal cues.

It was later determined that the tread on one of the tires given by Mr. Alston to Mr. Robinson had separated, causing Ms. Robinson to lose control of the vehicle. That tire, a P235/75R15 Firestone Radial ATX extra load tire, was the subject of a nationwide voluntary recall initiated by Firestone on 9 August 2000. Mr. Alston denied having any knowledge of the recall at the time he traded the tire to Mr. Robinson in 2002. Mr. Robinson testified that although he was aware of the recall program, he did not think about the recall when he received the tires from Mr. Alston.

On 27 May 2005, plaintiffs filed a personal injury action against Littleton, Mr. Alston, and Firestone.<sup>1</sup> In October 2005, defendants filed motions to compel plaintiffs to produce the tire for inspection. On 16 November 2005, the trial court entered an order compelling plaintiffs to comply with defendants' discovery requests and, on 22 February 2006, entered an order dismissing plaintiffs' complaint without prejudice for failure to comply with that order. Plaintiffs re-filed their complaint on 11 January 2007.

On 19 September 2008, Firestone filed a motion to dismiss plaintiffs' claim for punitive damages pursuant to Rule 12(b)(6) of the Rules of Civil Procedure and a motion for summary judgment as to all of plaintiffs' other claims based primarily on the six-year statute of repose set forth in N.C. Gen. Stat. § 1-50(a)(6). Plaintiffs did not oppose the dismissal of their punitive damages claim, and the trial court entered an order dismissing it on 6 October 2008.

With respect to Firestone's motion for summary judgment, plaintiffs sought a continuance of the hearing in order to have additional time to conduct discovery related to the statute of repose, including discovery as to when the tire was first sold. The trial court gave plaintiffs

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1. Plaintiffs' current appellate counsel did not represent plaintiffs in the proceedings below. It appears from the record that plaintiffs were represented by Indiana counsel and other North Carolina counsel during the trial-level proceedings.

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until 10 January 2009 to conduct additional discovery and allowed Firestone until 23 February 2009 to conduct responsive discovery.

On 21 January 2009, Firestone filed a motion to compel plaintiffs to supplement prior discovery; to make available for deposition their private investigator, Donald Looft, an Indiana private investigator retained by plaintiffs who had contacted Mr. Alston and the owner of Littleton, Ammie Ray Holloman, in December 2008; to make available for deposition any other witnesses not previously disclosed; and to produce documents.

The trial court conducted a hearing on the motion to compel on 5 February 2009, at which the court heard testimony from both Mr. Holloman and Mr. Alston. The trial court also admitted into evidence a document written by Mr. Looft and given to both Mr. Alston and Mr. Holloman as a “sample affidavit.” The proposed affidavit contained false information about the initial purchase of the tire. Both Mr. Holloman and Mr. Alston testified that Mr. Looft indicated to them that if they cooperated with plaintiffs and provided the false information about where and when the tire had been sold, plaintiffs would dismiss Littleton and Mr. Alston from the lawsuit.

In addition, according to Mr. Holloman, Mr. Looft had visited him twice at Littleton and demanded to speak with him about the case. When Mr. Holloman refused to discuss the case with him, Mr. Looft threatened to “make [his] life miserable.” Mr. Holloman took Mr. Looft’s conduct and statements to be “a direct threat” to his livelihood. Mr. Alston also testified that Mr. Looft visited him at Littleton and threatened him if he did not sign an affidavit similar to the “sample affidavit.”

The trial court, in an order entered 19 February 2009, granted Firestone’s motion to compel. With respect to Mr. Looft, the trial court found that he had engaged in conduct toward Mr. Holloman and Mr. Alston, who were not represented by counsel, that was designed to threaten and harass them. The trial court further found that Mr. Looft’s “actions were clearly designed to suborn perjured testimony from said witnesses.”

In addition, the trial court found that plaintiffs, in violation of Rule 26(e) of the Rules of Civil Procedure, had failed to identify any witness with knowledge regarding the date that the tire at issue was purchased. The trial court, therefore, ordered that plaintiffs were barred from introducing any testimony at a later hearing or trial regarding the date that the tire was purchased for use or consumption

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within the meaning of N.C. Gen. Stat. § 1-50(a)(6) except to the extent the information was disclosed during two depositions taken prior to plaintiffs' 10 January 2009 discovery deadline. In light of this ruling, the trial court denied Firestone's request to depose Mr. Loof as moot since any evidence obtained in that deposition would, by virtue of the court's order, be inadmissible.

On 9 and 17 February 2009, Littleton and Mr. Alston also filed motions for summary judgment. On 24 February 2009, the trial court granted summary judgment in favor of all of the Defendants. Plaintiffs timely appealed to this Court.

## I

**[1]** Plaintiffs' primary argument on appeal is that the trial court erred in concluding that the six-year products liability statute of repose applies to bar their claims. N.C. Gen. Stat. § 1-50(a)(6) provided:

No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

"A statute of repose is a substantive limitation, and is a condition precedent to a party's right to maintain a lawsuit." *Tipton & Young Constr. Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 117, 446 S.E.2d 603, 605 (1994), *aff'd per curiam*, 340 N.C. 257, 456 S.E.2d 308 (1995). "For injuries to which G.S. 1-50(6) is applicable, therefore, the plaintiff must prove the condition precedent that the cause of action is brought no 'more than six years after the date of initial purchase [of the product] for use or consumption.'" *Bolick v. American Barmag Corp.*, 306 N.C. 364, 370, 293 S.E.2d 415, 420 (1982) (quoting N.C. Gen. Stat. § 1-50(6)). "If plaintiff fails to prove that its cause of action is brought before the repose period has expired, . . . plaintiff's case is insufficient as a matter of law." *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 426, 391 S.E.2d 211, 213, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 674, 675 (1990).

Plaintiffs first point out that, in 2009, the General Assembly repealed § 1-50(a)(6) and amended Article 5 of Chapter 1 of the General Statutes by adding N.C. Gen. Stat. § 1-46.1(1) (2009), which provides:

No action for the recovery of damages for personal injury, death, or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought

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more than 12 years after the date of initial purchase for use or consumption.

As plaintiffs acknowledge, N.C. Gen. Stat. § 1-46.1(1) became effective 1 October 2009 and applies to causes of action that accrue on or after that date. Nonetheless, after noting that they would “have been able to meet [their] burden under the newly-enacted 12-year statute of repose,” plaintiffs argue that the adoption of N.C. Gen. Stat. § 1-46.1(1) indicates that “our elected representatives determined that a 6-year statute of repose created an unacceptable imbalance in favor of international manufacturers against injured North Carolinians.” To the extent that plaintiffs are arguing that the courts should apply N.C. Gen. Stat. § 1-46.1(1) to this action, we are barred from doing so by the General Assembly’s decision not to make the revised statute of repose retroactive. The six-year statute of repose set out in § 1-50(a)(6) applies to this action.

Plaintiffs filed their complaint on 27 May 2005. Under N.C. Gen. Stat. § 1-50(a)(6), the adult plaintiffs had to show that the allegedly defective tire was initially purchased within six years of the filing of the complaint—in other words, that the tire was purchased on or after 27 May 1999. The discovery obtained from Firestone showed that the tire in this case bore an identification number issued by the Department of Transportation (“DOT”). This DOT identification number indicated that the tire was manufactured at Firestone’s Decatur, Illinois manufacturing facility during the 35th week of 1995. All tires of the same type manufactured at the same plant during the same week of production have the same DOT identification number, which makes it impossible to track a particular tire.

Firestone does not maintain records tracking the sale of tires by their DOT identification number. Firestone also has no records indicating the date on which P235/75R15 Radial ATX tires bearing DOT number VDHL1LB355 were shipped from the plant or the location to which they were shipped. Although Firestone produced summaries of its shipment information for 1995 and 1996, that information does not show the dates of shipment, dates of sale, or the purchaser of the tires. Firestone has no information as to where any particular tire manufactured during the 35th week of 1995 went. Likewise, Mr. Alston and Littleton denied any knowledge of where or when the tire was initially purchased. The adult plaintiffs, therefore, have pointed to no evidence as to what happened to the tire after it was manufactured in August 1995 and have failed to meet their burden of proof.

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The analysis is different with respect to the minor plaintiffs. N.C. Gen. Stat. § 1-17(a) (2009) provides:

A person entitled to commence an action who is under a disability at the time the cause of action accrued may bring his or her action within the time limited in this Subchapter, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the real property, when the person must commence his or her action, or make the entry, within three years next after the removal of the disability, and at no time thereafter.

The statute, therefore, “provides for the tolling of most limitations periods during a person’s minority.” *Bryant v. Adams*, 116 N.C. App. 448, 456, 448 S.E.2d 832, 836 (1994), *disc. review denied*, 339 N.C. 736, 454 S.E.2d 647 (1995).

In *Bryant*, 116 N.C. App. at 458, 448 S.E.2d at 837, however, this Court held that “§ 1-17 does not completely eviscerate the statute of repose in the case of minors and others under disability.” It explained:

If a product is over six years old at the time of injury, which would be the time that the claim accrues, then the statute of repose operates as a total bar on that claim. However, if a claim accrues before the six year statute of repose has expired, G.S. § 1-17 simply operates to extend the time period within which a minor or other with disability may bring suit under Chapter 99B. Therefore, claims *accruing* after six years will still be barred.

*Id.*

The accident in this case occurred on 2 June 2002. Under N.C. Gen. Stat. § 1-17, the minor plaintiffs had to show that the accident occurred less than six years after the tire was initially sold. For this action to be timely, the tire would have had to have been first sold no earlier than 2 June 1996. As plaintiffs’ only evidence was that the tire was manufactured in August 1995, the six-year statute of repose could have expired prior to the accrual of the minor plaintiffs’ claims. Plaintiffs bore the burden of showing that the tire was not first sold until more than nine months after it was manufactured. While such a lapse of time might well be possible, plaintiffs have presented no evidence suggesting that this much time passed before sale.

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This case is controlled by *Vogl v. LVD Corp.*, 132 N.C. App. 797, 514 S.E.2d 113 (1999). In *Vogl*, a worker's fingers were injured in 1995 when parts called "flip fingers" installed on a press brake machine malfunctioned. *Id.* at 798, 514 S.E.2d at 114. The plaintiff brought suit in 1996, and the trial court concluded his claims were barred by the six-year statute of repose. *Id.* The defendant presented evidence that the defective flip fingers were the original parts sold with the machine in 1988 and finally installed in 1989. *Id.* at 800, 514 S.E.2d at 114-15. In opposition, the plaintiff relied upon his supervisor's testimony that (1) the company had eight to 10 flip fingers and used them interchangeably on three press brake machines and (2) the company had purchased four new flip fingers sometime after the supervisor was employed in 1993. *Id.*, 514 S.E.2d at 115. Plaintiff also presented expert testimony that the flip fingers on the press brake machine were no more than two to three years old at the time of the accident. *Id.*

This Court held that the plaintiff's evidence was insufficient to meet the plaintiff's burden of proof. The Court pointed out that the supervisor had not provided an actual purchase date for the flip fingers that had failed when the plaintiff was injured. In addition, the supervisor admitted that only two of the new flip fingers purchased after 1993 were in fact received prior to the 1995 accident and, even as to those, the supervisor could not provide a specific date of purchase. *Id.* With respect to the expert witnesses, the Court noted that they had based their conclusion that the flip fingers were only two to three years old solely on witness testimony that the parts were meant to be replaced frequently and that at least four flip fingers were purchased after the machine was installed. *Id.*

The Court then explained: "Given that the flip fingers are used interchangeably between the three press machines, [the company's] purchase of four flip fingers after 1993 does not establish that the new flip fingers were actually used in [the plaintiff's] machine on the day of the accident. This evidence is speculative at best that the defective flip fingers used in [the plaintiff's] machine were purchased after the press brakes' final installation." *Id.* at 800-01, 514 S.E.2d at 115. Based on this reasoning, the Court concluded that the plaintiff "failed to meet [his] burden of showing that there is a genuine issue of material fact as to whether his action was brought within the six year limit under the statute of repose." *Id.* at 801, 514 S.E.2d at 115.

In this case, plaintiffs' evidence is even more speculative. They have shown only the date that the tire was manufactured. Plaintiffs

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contend, however, that it could be possible that the tire's first sale was nine months after it was manufactured in the 35th week of 1995, which would bring it within the statute of repose. Plaintiffs highlight a scenario in which the tire sat in the warehouse, then was held up in shipment to retailers or distributors, and then delayed further in the stores. This theory, however, is no different than the speculation in *Vogl* that it was possible the flip fingers had been purchased inside the statute of repose period. As there is no actual evidence to support the possibility posed by plaintiffs, we hold that § 1-50(a)(6) bars plaintiffs' claim.

While plaintiffs acknowledge *Vogl*, they argue that the requirement that a plaintiff prove that he or she brought suit within six years of the first purchase of the product should not apply when the defendants did not keep records adequate to establish the date of the first purchase. Plaintiffs point out that they "bought the defective tire used[] from a tire dealer who neither kept adequate records of his tire inventory nor paid adequate attention to the recalls announced by tire manufacturers. Further, the tire manufacturer[] failed to keep adequate records of *even the first sale* of the products it put into commerce, or instructed the automobile manufacturers or retailers to whom it sold to keep records of tires purchased."

Neither *Vogl* nor the authority upon which it relied allows for shifting of the burden of proof based on the adequacy of potential defendants' records. In essence, plaintiffs ask this Court to carve out a common law exception to the statute of repose and shift the burden to the defendant to prove the date of the initial sale of the product in cases where the product was subject to a nationwide recall and information about the initial sale is in the exclusive possession and control of the manufacturer or seller. Plaintiffs cite no authority for this proposition, arguing only that it is unfair to allow a manufacturer to escape liability for defective products by failing to keep accurate and detailed records as to where that product went when it entered the stream of commerce.

It is well established North Carolina law, however, that a plaintiff has the burden of proving that the statute of repose does not bar his or her claim. Plaintiffs ask this Court to ignore the legislative intent expressed in N.C. Gen. Stat. § 1-50(a)(6) based on public policy arguments, something we cannot do. *See Ferguson v. Riddle*, 233 N.C. 54, 57, 62 S.E.2d 525, 528 (1950) ("The question of the wisdom or propriety of statutory provisions is not a matter for the courts, but

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solely for the legislative branch of the state government.”). Any exception to the burden of proof set out in *Bolick* would have to be first established by the Supreme Court or the General Assembly.<sup>2</sup>

In urging that the legislature has expressed disagreement with *Bolick*, plaintiffs point to a bill not enacted by the legislature that would have “rightfully shifted the burden to [defendants]—the parties with better information and access to such information than the [p]laintiffs herein.” We do not understand how this proposed, *but ultimately not enacted*, legislation can be, as plaintiffs contend, “[e]vidence of [l]egislative [d]isapproval.”

## II

**[2]** Plaintiffs also argue that because Firestone was unwilling to recover and submit information about where the tire went after it was manufactured, Firestone should be equitably estopped from asserting that plaintiffs’ claims are barred by the statute of repose. “A party may be estopped to plead and rely on a statute of limitations defense when delay has been induced by acts, representations, or conduct which would amount to a breach of good faith.” *Bryant*, 116 N.C. App. at 459-60, 448 S.E.2d at 838. “Equitable estoppel may also defeat a defendant’s statute of repose defense.” *Id.* at 460, 448 S.E.2d at 838.

“ ‘The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts.’ ” *Id.* (quoting *Hensell v. Winslow*, 106 N.C. App. 285, 290-91, 416 S.E.2d 426, 430, *disc. review denied*, 332 N.C. 344, 421 S.E.2d 148 (1992)). “ ‘The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.’ ” *Id.* (quoting *Hensell*, 106 N.C. App. at 290-91, 416 S.E.2d at 430).

“In order for equitable estoppel to bar application of the statute of repose, a plaintiff must have been induced to delay filing of the action by the conduct of the defendant that amounted to the breach of good faith.” *Wood v. BD&A Constr., L.L.C.*, 166 N.C. App. 216, 221,

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2. We note that plaintiffs’ reasoning regarding a potential plaintiff’s lack of access to records is less compelling in this case in which Mr. Robinson obtained the tire by trading used tires he purchased from an unknown person for four used, mismatched tires from Mr. Alston.

**SIMPSON v. SIMPSON**

[209 N.C. App. 320 (2011)]

601 S.E.2d 311, 315 (2004). Plaintiffs have not pointed to any evidence that they relied on Firestone's conduct in delaying the filing of their suit. We, therefore, affirm the trial court's grant of summary judgment. *See Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 509-10, 317 S.E.2d 41, 44 (1984) (affirming grant of summary judgment under statute of limitations where plaintiffs provided "no explanation as to what acts, representations or conduct by defendants . . . induced the [plaintiffs'] delay in initiating this action"), aff'd, 313 N.C. 488, 329 S.E.2d 350 (1985); *Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corp.*, 36 N.C. App. 778, 782, 245 S.E.2d 234, 236 (1978) (holding defendant not equitably estopped from pleading statute of limitations where there was nothing in record indicating that defendant induced plaintiff to delay initiation of action).

Affirmed.

Judges McGEE and ERVIN concur.

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AMY SIMPSON (IRISH), PLAINTIFF V. DARYL WAYNE SIMPSON, DEFENDANT

No. COA09-1131

(Filed 18 January 2011)

**Attorney Fees— motion to modify custody—reasonableness of attorney's hourly rate—judicial notice**

The trial court erred in denying plaintiff's request for attorney fees related to a child custody action based on the court's finding plaintiff failed to present sufficient evidence of the reasonableness of her attorney's hourly rates. A district court, considering a motion for attorney fees under N.C.G.S. § 50-13.6, was permitted, although not required, to take judicial notice of the customary hourly rates of local attorneys performing the same services and having the same experience.

Appeal by plaintiff from order entered 12 June 2009 by Judge Martin B. McGee in Cabarrus County District Court. Heard in the Court of Appeals 11 February 2010.

*Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by James R. DeMay, for plaintiff-appellant.*

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[209 N.C. App. 320 (2011)]

*Conroy & Weinshenker, P.A., by Seth B. Weinshenker, for defendant-appellee.*

GEER, Judge.

Plaintiff Amy Simpson (Irish) appeals from an order denying her motion for attorney's fees following a hearing on defendant Daryl Wayne Simpson's motion for modification of child custody. In denying the motion, the trial court found that plaintiff had failed to present sufficient evidence of the reasonableness of her attorney's hourly rates. We agree with plaintiff that the customary rate of local attorneys' fees is a proper subject for judicial notice in connection with motions for attorneys' fees brought under N.C. Gen. Stat. § 50-13.6 (2009). Because the trial court stated in its order that it was precluded from taking judicial notice of local rates and, therefore, acted under a misapprehension of law when the court made its findings of fact, we must reverse and remand for further findings of fact.

**Facts**

Plaintiff and defendant had three children during their marriage. After plaintiff and defendant separated, a consent order was entered on 21 April 2006 pursuant to which the parties agreed that plaintiff would have primary physical custody of the minor children. Subsequently, on 12 August 2008, defendant filed a motion for modification of the consent order requesting that the trial court allow the parties to share physical custody with each parent having the children 50% of the time.

At the 13 January 2009 hearing on defendant's motion, plaintiff moved to dismiss the motion on the grounds that defendant had failed to show a substantial and material change of circumstances affecting the best interest and welfare of the children sufficient to justify a change in the custody arrangement under the consent order. The trial court agreed and granted plaintiff's motion to dismiss in an order entered 27 January 2009.

On 9 February 2009, plaintiff filed a verified "Motion to Tax Costs," seeking both costs and attorney's fees. The verified motion stated that plaintiff had incurred reasonable stenographic expenses in the amount of \$718.50 and attorney's fees in the amount of \$9,172.50. As support for this motion, plaintiff attached the court reporter's invoice, a "History Bill" from plaintiff's counsel, and plaintiff's affidavit of financial status.

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On the same day, plaintiff also filed a document entitled “Memorandum of Costs and Disbursements” and “Verification by Attorney.” In this document, which was notarized, plaintiff’s counsel stated:

I am the attorney for the Plaintiff and in that capacity am better informed relative to the within costs and disbursements than my client or any of my associate counsel. To the best of my knowledge and belief, the items contained in [the] attached History Bill are correct, and the disbursements have been necessarily incurred in the action or proceedings.

As the memorandum indicated, it attached the History Bill.

At the 12 March 2009 hearing on plaintiff’s motion, the trial court told the parties that, following the hearing, they could submit additional legal authority, but the court would not receive any additional evidence. Nonetheless, on 19 March 2009, a week after the hearing, plaintiff’s counsel filed an affidavit in which he stated, “The rates that I charge are well within the parameters and rate structure of a majority of the attorneys in Cabarrus County and well below an attorney with similar skills in Mecklenburg County.”

On 12 June 2009, the trial court entered its “Order Awarding Costs.” The trial court found that plaintiff acted in good faith in defending against defendant’s motion and that “[p]laintiff’s counsel skillfully represented plaintiff in defending against defendant’s motion to modify and time spent on the case by plaintiff’s attorney was reasonable and necessary.” With respect to the reasonableness of the hourly rate charged by plaintiff’s counsel, the court found:

There was no evidence offered at the hearing regarding the reasonableness of the hourly rate charged by Plaintiff’s counsel in comparison with other lawyers as required by *Falls v. Falls*, 52 N.C. App. 203, 221[, *disc. review denied*, 304 N.C. 390, 285 S.E.2d 831] (1981). The Affidavit of Edwin H. Ferguson, Jr., to the extent it offered evidence on the reasonableness issue, is not properly before the Court because it was offered after the hearing in violation of this Court’s instructions. Also, the *Falls* case precludes the Court from taking judicial notice of the typical fees charged by counsel in our area and find [sic] that the charges and time spent [are] reasonable.

On the issue of plaintiff’s ability to pay her attorney, the court found: “Based upon her affidavit, the plaintiff is not employed and

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has insufficient means to defray the cost of this action, but the Defendant did not have the opportunity to cross-examine her at the hearing." As for defendant's ability to pay, the trial court found:

13. Plaintiff did not call defendant to testify or offer any evidence at the hearing herein regarding his ability to pay defendant's attorney's fees. Plaintiff's counsel asserted that the defendant had offered testimony bearing upon this issue when his motion to modify custody was heard in January 2009.

14. There was no evidence offered by defendant regarding what changes, if any, have occurred regarding defendant's income and expenses since the January 2009 hearing.

Based on these findings, the trial court, citing the *Falls* case, concluded that "plaintiff failed to offer sufficient evidence for the Court to award attorney's fees." The court, therefore, denied the motion for attorney's fees, although it awarded plaintiff \$748.50 in costs. Plaintiff timely appealed to this Court.

### Discussion

The sole issue on appeal is whether the trial court erred in denying plaintiff's request for attorney's fees. N.C. Gen. Stat. § 50-13.6 provides that in a proceeding for modification of child custody, "the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit." "Whether these statutory requirements have been met is a question of law, reviewable on appeal." *Doan v. Doan*, 156 N.C. App. 570, 575, 577 S.E.2d 146, 150 (2003) (quoting *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980)). "Only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney's fees awarded." *Id.*

In this case, the trial court concluded that plaintiff offered insufficient evidence to support an award of attorney's fees. While plaintiff focuses entirely on whether the trial court properly found that she offered no evidence regarding the reasonableness of her attorney's hourly rate, defendant argues that the trial court also found that plaintiff failed to prove that she had insufficient means to defray the expense of the proceeding. Defendant contends that the order may be upheld on that basis regardless of the propriety of the court's findings on the hourly rate issue.

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Review of the order does not support defendant's contention. The finding of fact as to plaintiff's means is ambiguous. The finding of fact starts by stating that plaintiff "has insufficient means to defray the cost of this action," referring to plaintiff's financial affidavit as support. It goes on, however, to note that defendant did not have an opportunity to cross-examine plaintiff. The finding can reasonably be read either as determining that plaintiff met this statutory requirement or as determining that the evidence offered on that issue was not competent and, therefore, insufficient to meet the statutory requirement. Because of this ambiguity, this finding of fact is not adequate to support the trial court's denial of the motion for attorney's fees.

The trial court's order is, however, unambiguous regarding the sufficiency of the evidence as to the reasonableness of counsel's hourly rate: "There was no evidence offered at the hearing regarding the reasonableness of the hourly rate charged by Plaintiff's counsel in comparison with other lawyers as required by *Falls* . . ." It is well established that in order to "support the reasonableness of an award of attorney fees, the trial court must make 'findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers.'" *Cunningham v. Cunningham*, 171 N.C. App. 550, 565-66, 615 S.E.2d 675, 686 (2005) (quoting *Cobb v. Cobb*, 79 N.C. App. 592, 595, 339 S.E.2d 825, 828 (1986)).

According to *Falls*, 52 N.C. App. at 221, 278 S.E.2d at 558, the trial court cannot make the findings necessary to support an award of attorney's fees unless the party seeking the fees offers evidence to support those findings. Here, plaintiff does not dispute that the only evidence she presented on the reasonableness of her counsel's hourly rate was contained in the affidavit filed after the hearing on her motion. She also does not challenge the trial court's decision not to consider that affidavit. There is thus no dispute that plaintiff failed to submit evidence as to the reasonableness of her attorney's rates in comparison with the rates of other local attorneys.

The question, then, is whether plaintiff could satisfy the *Falls* requirements by asking the trial court to take judicial notice of the customary rates of local attorneys.<sup>1</sup> Although the trial court stated in

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1. As to this point, plaintiff does not go so far as to insist that the trial court was *required* to take judicial notice of local rates, but rather contends that "it is entirely appropriate for a court to take judicial notice of such, as it is something well within the knowledge of the trial court."

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its findings of fact that *Falls* prohibits the court from taking judicial notice of customary local rates, we agree with plaintiff that nothing in *Falls* addresses judicial notice. In *Falls*, this Court reversed a trial court's award of attorneys' fees under N.C. Gen. Stat. § 50-13.6 because:

To support an award of attorney's fees, the trial court should make findings as to the lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent. No such findings could be made in this case because there was no evidence on these vital matters. Moreover, the required statutory findings that the wife is acting in good faith and has insufficient means to defray the expenses of the suit, have not been made.

52 N.C. App. at 221, 278 S.E.2d at 558.

Thus, *Falls* requires "evidence" of the reasonableness of an attorney's hourly rate. It does not dictate the form of the evidence. As this Court emphasized in *Mason v. Town of Fletcher*, 149 N.C. App. 636, 640, 561 S.E.2d 524, 527, *disc. review denied*, 355 N.C. 492, 563 S.E.2d 570 (2002) (quoting *State v. Smith*, 73 N.C. App. 637, 638, 327 S.E.2d 44, 45-46 (1985)), "It is not the law that facts essential to a judgment can only be established by the testimony of witnesses, by exhibits introduced into evidence, or by a stipulation of the parties; they can also be established by judicial notice." Thus, *Falls* does not bar a trial court from taking judicial notice of customary rates of local attorneys. It simply does not address the issue.

The question remains whether the customary hourly rates of attorneys is a proper subject for judicial notice. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C.R. Evid. 201(b).

As our Supreme Court has explained, "[t]here are many facts of which the court may take judicial notice, and they should take notice of whatever is, or ought to be, generally known within the limits of their jurisdiction, for justice does not require that courts profess to be more ignorant than the rest of mankind." *State v. Vick*, 213 N.C. 235, 238, 195 S.E. 779, 780-81 (1938). This Court has previously recognized "a wide range of miscellaneous facts which will or may be judicially noticed," such as the following:

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“[T]he laws of nature; human impulses, habits, functions and capabilities; the prevalence of a certain surname; established medical and scientific facts; *well-known practices in farming, construction work, transportation, and other businesses and professions*; the characteristics of familiar tools and appliances, weapons, intoxicants, and poisons; the use of highways; the normal incidence of the operation of trains, motor vehicles, and planes; prominent geographical features such as railroads, water courses, and cities and towns; population and area as shown by census reports; the days, weeks, and months of the calendar; the effect of natural conditions on the construction of public improvements; the facts of history; important current events; general economic and social conditions; matters affecting public health and safety; the meaning of words and abbreviations; and the results of mathematical computations.”

*Hinkle v. Hartsell*, 131 N.C. App. 833, 836, 509 S.E.2d 455, 457-58 (1998) (emphasis added) (quoting 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 27, 104-09 (5th ed. 1998)).

Although we have found no North Carolina case specifically addressing whether a trial court may take judicial notice of customary hourly rates for attorneys in a community, we note at the outset that courts in several other jurisdictions have expressly approved of this practice. *See, e.g., Waters v. Kemp*, 845 F.2d 260, 265 (11th Cir. 1988) (taking judicial notice of fees customarily charged by lawyers in Savannah, Georgia performing particular types of services); *Mut. of Omaha Ins. Co. v. Halsell*, — F. Supp. 2d —, 2010 WL 638452, \*1, 2010 U.S. Dist. LEXIS 14607, \*4 (W.D. Tex. Feb. 19, 2010) (unpublished) (holding court “may take judicial notice of reasonable and customary fees”); *Luessenhop v. Clinton County*, 558 F. Supp. 2d 247, 258 (N.D.N.Y. 2008) (explaining that in determining prevailing market rate, “it is incumbent upon the district court to take judicial notice of rates in prior cases, the evidence submitted by the parties, and its own familiarity and experience with rates within its relevant community”), *aff’d*, 324 Fed. Appx. 125 (2d Cir. May 8, 2009) (unpublished); *Bishop v. Osborn Transp., Inc.*, 687 F. Supp. 1526, 1531 (N.D. Ala. 1988) (exercising discretion to take judicial notice of range of customary hourly rates for lawyers in Northern District of Alabama); *Whitman v. Fuqua*, 561 F. Supp. 175, 181 (W.D. Pa. 1983) (noting court “by law may take notice of the customary rates in the community for attorneys of comparable standing, skill and experience” and observing that “[a] judge is presumed knowledgeable as to the fees

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charged by attorneys in general and as to the quality of legal work presented to him by particular attorneys' " (quoting *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 169 (3d Cir. 1973)); *Daimler Chrysler Corp. v. Franklin*, 814 N.E.2d 281, 288 (Ind. Ct. App. 2004) ("[T]he reasonableness of attorney's fees is a matter regarding which the judge, being a lawyer, may take judicial notice.").

Turning back to North Carolina case law, we note that our Courts have, on occasion, approved of trial courts taking judicial notice of various attorney-related practices. See, e.g., *Sell v. Hotchkiss*, 264 N.C. 185, 188, 141 S.E.2d 259, 262 (1965) (taking notice that releases and covenants not to sue are ordinarily prepared by insurer); *Collins v. N.C. State Highway & Pub. Works Comm'n*, 237 N.C. 277, 283, 74 S.E.2d 709, 714 (1953) ("We know judicially that it is customary in practice for an attorney to accept service of notice in behalf of his client, and in that way waive service by an officer."); *Smith v. Beaufort County Hosp. Ass'n*, 141 N.C. App. 203, 211, 540 S.E.2d 775, 780 (2000) (holding that trial court, "on [its] own accord, properly took judicial notice of (1) the number of highly skilled plaintiffs' attorneys engaged in the trial of medical negligence actions in our state as that information is generally known within the jurisdiction of the trial courts of this state, and (2) the number of times [a certain law firm] participated in litigation in North Carolina by relying on information supplied by the North Carolina State Bar Association as that information is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 435, *aff'd per curiam*, 354 N.C. 212, 552 S.E.2d 139 (2001).

We also recognize that the Supreme Court has previously permitted the taking of judicial notice of customary payment practices in other industries. See *Economy Pumps, Inc. v. F. W. Woolworth Co.*, 220 N.C. 499, 502, 17 S.E.2d 639, 641 (1941) ("We may take judicial notice that the arrangement of paying the cost plus a percentage as a contract price for a completed job is growing in favor, and is becoming a common plan adopted by contractors in place of a lump sum payment." (quoting *Carleton v. Foundry & Mach. Prods. Co.*, 199 Mich. 148, 159, 165 N.W. 816, 819 (1917))).

Fee applications are routinely filed in district courts pursuant to N.C. Gen. Stat. § 50-13.6. At least with respect to such fee applications, we are persuaded by the reasoning of other jurisdictions allowing

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judicial notice of the reasonableness of the hourly rate sought. We also believe that this reasoning is consistent with the application of judicial notice in North Carolina. We, therefore, hold that a district court, considering a motion for attorneys' fees under N.C. Gen. Stat. § 50-13.6, is permitted, although not required, to take judicial notice of the customary hourly rates of local attorneys performing the same services and having the same experience.<sup>2</sup>

If, however, the trial court determines that it lacks the necessary knowledge or that the customary hourly rate is in fact subject to debate in the community, then the trial court should decline a request to take judicial notice of the rates. *See Hinkle*, 131 N.C. App. at 837, 509 S.E.2d at 458 (holding judicial notice was improper where prevalence of crime at motel and how crime affected residents was "no doubt a matter of debate within the community"); *Thompson v. Shoemaker*, 7 N.C. App. 687, 690, 173 S.E.2d 627, 630 (1970) (holding alleged unavailability of low income housing in City of Charlotte was "undoubtedly subject to debate" and was not factor that could properly be judicially noticed by Court), superseded by statute on other grounds as stated in *Miller v. C.W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 355 S.E.2d 189 (1987).

In this case, the trial court believed that it was "preclude[d] . . . from taking judicial notice of the typical fees charged by counsel in our area and find[ing] that the charges and time spent is reasonable." Consequently, the trial court reached its decision under a misapprehension of law. Our Supreme Court has held that "there is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented. Where the error is prejudicial, the defendant is entitled to have his motion reconsidered and passed upon as a discretionary matter." *State v. Lang*, 301 N.C. 508, 510, 272 S.E.2d 123, 125 (1980). *See also Greer v. Greer*, 175 N.C. App. 464, 473, 624 S.E.2d 423, 429 (2006) ("When a court makes its findings of fact under a misapprehension of the law, the affected findings must be set aside and the case remanded so that the remaining evidence may be considered in its 'true legal light.' " (quoting *McGill v. Town of Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939))).

Because plaintiff did not present any evidence of the reasonableness of her attorney's hourly rate, the trial court's belief that it lacked

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2. We stress, nonetheless, that the better practice is for parties to provide evidence of the customary local rates rather than depending upon judicial notice.

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authority to apply the judicial notice doctrine in this context was instrumental in its decision. We must, therefore, reverse and remand to allow the trial court to decide whether it should exercise its discretion to take judicial notice of the typical fees charged in this jurisdiction in cases such as this one.

On remand, the trial court may also wish to clarify certain ambiguous findings of fact. We have already noted the confusion related to the court's finding regarding the sufficiency of plaintiff's means to defray the costs of this litigation. In addition, with respect to the additional requirement that defendant have the ability to pay plaintiff's attorney's fees, the trial court found that "[p]laintiff's counsel asserted that the defendant had offered testimony bearing upon this issue when his motion to modify custody was heard in January 2009" and that "[t]here was no evidence offered by defendant regarding what changes, if any, have occurred regarding defendant's income and expenses since the January 2009 hearing." The trial court, however, never actually made a finding that defendant has the ability to pay plaintiff's attorney's fees. While such a finding would not be necessary if the trial court again declines to grant plaintiff's motion for attorney's fees, the trial court must resolve this issue if it concludes that plaintiff is entitled to fees.

Reversed and remanded.

Judges CALABRIA and STEPHENS concur.

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STATE OF NORTH CAROLINA v. JEREMY BRIAN JENNINGS, DEFENDANT

No. COA10-503

(Filed 18 January 2011)

**1. Evidence— physician's testimony—explanation of lack of physical evidence**

There was no plain error in a prosecution for statutory rape and related offenses in a physician testifying that it was probable that a tear in the victim's hymen would have healed by the time she saw the victim. This was not an impermissible opinion about the victim's credibility, but an explanation of the lack of physical

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findings indicating sexual abuse. Moreover, the evidence against defendant was overwhelming.

**2. Evidence—forensic computer expert—disposal of evidence**

There was no plain error in a prosecution for statutory rape and related offenses in allowing the State's forensic computer expert, who had found nothing illicit in his examination of defendant's computer equipment, to answer hypothetical questions about disposing of or hiding evidence. The testimony was in the scope of his expertise and did not invade the province of the jury. Moreover, the evidence of defendant's guilt was overwhelming.

Appeal by defendant from judgments entered 8 October 2009 by Judge Tanya T. Wallace in Cabarrus County Superior Court. Heard in the Court of Appeals 27 October 2010.

*Attorney General Roy Cooper, by Assistant Attorney General Jacqueline M. Perez, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.*

HUNTER, Robert C., Judge.

Defendant Jeremy Brian Jennings appeals his convictions of three counts of statutory rape, two counts of statutory sex offense, and one count of taking indecent liberties with a minor. After careful review, we find no error.

**Facts**

The State's evidence at trial tended to establish the following facts: In the summer of 2006, A.S. ("Anna") was 14 years old and living with her mother and older sister in Cabarrus County.<sup>1</sup> Defendant, who was 28 at the time, and his wife were neighbors and Anna would see them out in the neighborhood a couple of times a week. Anna's family was having problems with their computer and asked defendant, who had some computer skills, if he would try to fix it. Defendant took the computer to his house, fixed the problem, and returned it to Anna's house.

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1. The pseudonym "Anna" is used throughout this opinion to protect the minor's privacy and for ease of reading.

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Later, while Anna was doing homework one night, she received an instant message on the computer from defendant, although she had not given defendant her “screen name.” Defendant told Anna that he had liked her “for a while” and asked her to call him that night. When Anna called defendant, she thought it was “weird” because he was an “older guy.” After talking for a while, defendant began describing “sexual favors” he wanted Anna to do to him.

Defendant and Anna began instant messaging or talking on the telephone almost every day and defendant would tell Anna that he loved her, that he wanted her to perform oral sex on him, and that he wanted to have sex with her. One night in January 2007, Anna snuck out of her window after midnight and met defendant at a gas station near her house. Anna got into defendant’s car and he drove to a cul-de-sac and parked. Anna sat on defendant’s lap and they kissed “with tongue.” After about an hour and a half, defendant thought it was getting late and took Anna back home.

Sometime after 1 February 2007 but before Anna’s 15th birthday (March 2007), defendant told Anna that he was “going to Iraq” and that she would not see him again. That night, Anna snuck out of her house late at night and met defendant at the gas station. Defendant drove Anna to his mother’s house in Harrisburg, where he was then living. After watching television in defendant’s room for a while, defendant took off his shirt and Anna’s and started kissing her. Defendant then asked her to “give him oral sex.” Defendant took his pants off and Anna performed oral sex on him. Defendant next took off Anna’s pants and inserted his tongue and his fingers into her vagina. Defendant then made Anna get on her hands and knees and had sex with her. Afterward, Anna was bleeding and defendant gave Anna a towel to wipe off the blood. Defendant and Anna got dressed and defendant drove her home.

After that night, defendant and Anna continued to instant message and talk on the telephone. Defendant also set up a page on the social networking site MySpace for them to communicate. Defendant labeled the page “Pomp Daddy” as a reference to a instance when Anna and defendant were instant messaging and Anna accidentally called defendant “Pomp Daddy” when she intended to type “Pimp Daddy.”

Defendant told Anna that he wanted to have sex with her again. Sometime after Anna’s birthday in March 2007, they met again at the gas station late at night. Defendant was driving a black Chevrolet

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Tahoe that belonged to his boss, Daniel Phillips. They drove to a construction site, where they parked and kissed for a while. Defendant eventually asked Anna if she wanted to move to the back-seat. Defendant put the backseats down and spread out a blanket for them to lie on. Defendant and Anna took off their clothes, performed oral sex on each other, and began having sex. During intercourse, defendant took a photograph of his penis inserted in Anna's vagina and one of her "vaginal area." Afterward, defendant and Anna got dressed and he drove her home.

Sometime around June 2007, Anna met defendant and they drove in defendant's boss's black SUV to the same construction site. They got into the backseat of the SUV, performed oral sex on each other, and engaged in sexual intercourse.

During the period in which defendant had access to his boss's black Tahoe, Phillips noticed that often when defendant returned the vehicle, the backseats would be folded down and that there would a blanket or a pillow in the back. On one occasion, while driving to a work site with defendant, Phillips overheard him having a cell phone conversation in which he described doing certain sexual acts with the other person on the phone. After arriving at the job site, instead of getting off the phone to begin working, defendant put the phone on speaker phone so that both he and Phillips could hear the conversation. Phillips was "shocked" when he heard a "young girl[s]" voice on the phone. Phillips, a longtime friend of Anna's mother's boyfriend, recognized Anna's voice and asked defendant if Anna was the girl on the phone. Defendant did not answer the question but had a "grin on his face like a Cheshire cat." Defendant later admitted that he was having a "relationship" with Anna and Phillips told him that he needed to end the relationship.

Defendant stopped communicating with Anna in May 2007, after meeting Jamie Cagle. When defendant stopped responding to her instant messages, texts, and posts on MySpace, Anna eventually called defendant. Defendant handed the phone to Cagle, who told Anna that she was defendant's girlfriend.

On 25 October 2007, Anna was seen by Doctor Carla Jones, complaining of painful urination. When asked by Dr. Jones, Anna denied being sexually active because she did not want to get defendant in trouble. Based on her symptoms and reported history, Anna was diagnosed as having a bladder infection. When the condition recurred in May 2008, Anna became concerned that she had a sexually

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transmitted disease and told her mother that she had sex with defendant. Anna's mother immediately took her to the Child Advocacy Center, where Dr. Jones conducted a sexual abuse examination. Anna was diagnosed as having bacterial vaginitis, but the physical examination was normal.

Defendant was charged with three counts of statutory rape, two counts of statutory sex offense, and one count of taking indecent liberties with minor. Defendant pled not guilty and the case proceeded to trial, where the jury convicted defendant of all charges. The trial court consolidated the indecent liberties charge with one count of statutory rape and sentenced defendant to a presumptive-range term of 240 to 297 months imprisonment. The trial court also consolidated the two remaining statutory rape charges with the two statutory sex offense convictions and sentenced defendant to a consecutive presumptive-range term of 230 to 285 months imprisonment. Defendant gave oral notice of appeal in open court.

Standard of Review

Defendant's arguments on appeal are limited to challenging the admission of certain expert testimony by Dr. Jones, the physician that performed Anna's sex abuse examination, and by Sergeant Brian Shiele, the police officer, qualified in computer forensics, who examined defendant's computer. As defendant did not object to either witness' testimony, defendant's contention regarding the admissibility of the experts' testimony is reviewed for plain error. *See State v. Goforth*, 170 N.C. App. 584, 589, 614 S.E.2d 313, 316 (reviewing admission of expert testimony for plain error where “[d]efendant neither objected to nor moved to strike th[e] testimony”), cert. denied, 359 N.C. 854, 619 S.E.2d 854 (2005). Under plain error analysis, the defendant bears the burden of demonstrating “not only that there was error, but that absent the error, the jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

## I

[1] With respect to Dr. Jones, she was qualified—without objection from defendant—as an expert in family medicine. She testified on direct-examination about the healing process of the vaginal orifice. Using a “hair scrunchie,” Dr. Jones illustrated how the vaginal opening in mature females stretches and retracts after they begin “making estrogen.” Dr. Jones also showed the jury a time-lapse

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photographic display of an “obvious [hymen] tear” healing over a four month period to the extent that the tear is no longer visible. Based on her illustrations, Dr. Jones explained that if she performed an initial examination of a child four months after an alleged incident of sexual abuse, she would be unable to conclude “one way or the other” as to whether the child had been sexually abused. The prosecutor then asked Dr. Jones about her examination of Anna:

Q. Dr. Jones, when [Anna] presents to your office, it is one year after this event.

A. Yes.

Q. Is it possible that she could have had a tear or some of these items that you just pointed out, but by the time you get her a year later, it could be gone?

A. More than possible, probable.

Q. Is it also possible because she was estrogenized like you talked about with the scrunchie that there wasn’t any injuries at all to begin with?

A. It is possible.

Q. That he just didn’t cause any [injury] when he—if—if he engaged in sexual activity with her?

A. It’s possible.

Defendant contends that “Dr. Jones’ opinion that it was ‘probable’ there had been a tear in [Anna]’s hymen was inadmissible expert testimony as it lacked sufficient foundation and constituted impermissible opinion on the credibility of the prosecuting witness.” See generally *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (per curiam) (“In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has in fact occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim’s credibility.” (emphasis ommitted)).

We read Dr. Jones’ testimony differently than defendant. Viewed in context of her explanation regarding the time frame for the healing of a hymen tear, Dr. Jones testified, not that “it was ‘probable’ that there had been a tear in [Anna]’s hymen,” as defendant suggests, but, rather, that *if there had been a tear* in Anna’s hymen as a result of sexual activity with defendant, the tear “probabl[y]” would have

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healed by the time she saw Anna, roughly a year after the last alleged incident of sexual abuse. The State's purpose in presenting Dr. Jones' testimony was to explain to the jury that the lack of physical findings indicative of sexual abuse did not necessarily establish that Anna was not sexually abused by defendant. This type of testimony is not an impermissible opinion regarding the complainant's credibility. The trial court, therefore, did not err, much less commit plain error, in admitting Dr. Jones' testimony.

Even assuming error, however, defendant cannot demonstrate prejudice resulting from the admission of Dr. Jones' testimony. At trial, Anna testified in explicit detail about defendant's kissing her, his performing cunnilingus on Anna at his mother's house, and his forcing Anna to have sex with him once at his mother's house and twice at a construction site. In addition to Anna's testimony, Mr. Phillips, defendant's boss, testified about overhearing a cell phone conversation between defendant and another person in which defendant discussed engaging in sexual acts with that person. Defendant later told Mr. Phillips that Anna was the other person on the phone and that he was having a "relationship" with her. The State also presented evidence that, in addition to Anna, defendant's ex-wife and girlfriend were both diagnosed with bacterial vaginitis, a bacteria that, according to Dr. Jones, may be sexually transmitted. Given this overwhelming evidence, we cannot conclude that, had Dr. Jones' testimony not been admitted, the jury probably would have reached a different result at trial. *See id.* at 267, 559 S.E.2d at 789 ("The overwhelming evidence against defendant leads us to conclude that the error committed did not cause the jury to reach a different verdict than it otherwise would have reached. Accordingly, although the trial court's admission of the challenged portion of Dr. Prakash's testimony was error, it did not rise to the level of plain error."); *State v. Brigman*, 178 N.C. App. 78, 91-92, 632 S.E.2d 498, 507 (holding error in admission of expert opinion that "'children suffered sexual abuse by [defendant]' did not constitute plain error due to "overwhelming" evidence of defendant's guilt: children "described details of the abuse and identified defendant as their abuser" and defendant's claims to have sexually abused the children were corroborated by inmate), *appeal dismissed and disc. review denied*, 360 N.C. 650, 636 S.E.2d 813 (2006).

## II

[2] Defendant also contends that the trial court committed plain error by admitting the expert testimony of Sergeant Schiele. After being

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accepted by the trial court as an expert in forensic computer examination, Sergeant Schiele testified that, based on the initial complaint and witness interviews, the police department obtained and executed a search warrant for defendant's residence, "looking for computer equipment, peripheral devices, [such as] scanners, printers, [and] keyboards," as well as "cameras, memory cards for cameras, digital versatile disks, compact disks, floppy disks, pretty much anything computer-related . . ." He then stated that, although he was unable to examine two computer hard drives because there was "something physically wrong" with one of the drives and the other had been "wiped clean," he had been able to examine five other hard drives, four camera memory cards, and numerous compact discs. Sergeant Schiele reported that he found "nothing illicit," such as "sexually illicit photos or any correspondence between [defendant] and the victim."

The prosecutor then asked Sergeant Schiele a series of four hypothetical questions, which, although not objected to at trial, now form the basis of defendant's argument on appeal:

Q. Sergeant Schiele, based on your training and experience, do those who have proof of criminal activity on a computer, do they make attempts to hide it?

A. Some will make attempts to hide it; yes.

....

Q. Based on your training and experience, someone conducting an illegal relationship, [do] you think they would hit "save" to save that conversation?

A. No.

....

Q. Based on your training and experience, was [defendant] given enough time if, hypothetically, he wanted to dispose of things, would that have been enough time to dispose of it?

A. Yes.

....

Q. Based on your experience and training, would someone who set up a site for a young girl put their real statistics for law enforcement to find?

A. No.

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Defendant argues that Sergeant Schiele's testimony is "inadmissible expert testimony as it was not based on his expertise in computer forensics, was not helpful to the jury, and constituted impermissible opinion as to [defendant]'s guilt."

Rule 702 of the Rules of Evidence governs the admissibility of expert testimony, providing in pertinent part: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. R. Evid. 702(a); *State v. Chandler*, 364 N.C. 313, 316, 697 S.E.2d 327, 329-30 (2010). Thus, expert testimony is admissible under Rule 702 "when it can assist the jury in drawing certain inferences from facts and the expert is better qualified than the jury to draw such inferences." *State v. Evangelista*, 319 N.C. 152, 163, 353 S.E.2d 375, 383 (1987). Although the trial court "should avoid unduly influencing the jury's ability to draw its own inferences, expert testimony is proper in most facets of human knowledge or experience." *State v. Brockett*, 185 N.C. App. 18, 28, 647 S.E.2d 628, 636, *disc. review denied*, 361 N.C. 697, 654 S.E.2d 483 (2007).

As one appellate court has explained, "[i]t is common . . . for experts to testify in criminal cases about the *modus operandi* of certain types of criminal offenders [and] [c]ourts generally permit such expert testimony because jurors cannot be presumed to have knowledge of these matters, and it therefore may help the jury understand and evaluate the evidence." *Jones v. United States*, 990 A.2d 970, 978 (D.C. 2010). Pertinent here, this Court has held that law enforcement officers may properly testify as experts about the practices criminals use in concealing their identity or criminal activity. See *State v. Alderson*, 173 N.C. App. 344, 350-51, 618 S.E.2d 844, 848-49 (2005) (holding trial court properly permitted SBI agent to "give her opinion as to why the seizure of defendant's police frequency book was important, testifying that finding a police frequency book and a radio scanner can indicate those acting illegally may have a 'jump-start' if they know which police frequencies to monitor."); *State v. White*, 154 N.C. App. 598, 604, 572 S.E.2d 825, 830-31 (2002) ("Lieutenant Wood had 'training, and various courses and experience in working certain cases which led him to conclude that 'there are times that the significance of an object such as a pillow or a cloth being placed over somebody's face can mean in a case that the perpetrator knew the victim and did not want to see their face or have

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their face appear either before, during, or after the crime.’ Since Lieutenant Wood testified in the form of an opinion based on his expertise, and the testimony was likely to assist the jury making an inference from the circumstances of the crime, the trial court properly admitted the testimony.”).

Prior to being admitted as an expert in computer forensics, Sergeant Schiele described his specialized training and experience, which included, among other things, training in computer hardware fundamentals, computer forensics, advance data recovery and analysis, computer network forensics, and cell phone forensics. He also indicated that he had performed “probably around a hundred exams.” Consequently, because of his training and experience in computer forensics, Sergeant Schiele was “in a better position to have an opinion on the subject than [was] the trier of fact.” *State v. Wilkerson*, 295 N.C. 559, 569, 247 S.E.2d 905, 911 (1978).

Defendant nonetheless contends that Sergeant Schiele’s testimony impermissibly exceeded the scope of his expertise in computer forensic examination because he found “nothing incriminating.” Similar to Dr. Jones’ testimony, the State elicited the challenged testimony from Sergeant Schiele to explain why, despite Anna’s testifying that she and defendant routinely communicated through instant messaging and their MySpace web page and that defendant took digital photographs of her vaginal area during sex, no evidence of these communications or photographs were recovered from defendant’s computer equipment, camera, or storage devices. As Sergeant Schiele’s expertise included training in areas such as “advance data recovery and analysis,” “cyber crime investigation,” and “on-line crime scene investigation,” his testimony addressing how a person might hide or destroy incriminating information on a computer or provide false personal information in order to avoid detection was within the scope of his expertise.

Defendant also argues that Sergeant Schiele’s testimony “constituted [an] improper opinion on [defendant’s] guilt.” While defendant is correct that “law enforcement officers [should not be permitted] to provide their opinions regarding [a] defendant’s guilt,” *State v. Carrillo*, 164 N.C. App. 204, 211, 595 S.E.2d 219, 224 (2004), *appeal dismissed and disc. review denied*, 359 N.C. 283, 610 S.E.2d 710 (2005), Sergeant Schiele’s testimony did not “impermissibly invade[] the province of the jury” by “dr[awing] an inference about the defendant’s guilt” from the evidence, *State v. Owens*, N.C. App. —, —, 695

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S.E.2d 823, 826 (concluding detective's testimony that police "considered" tools found on defendant to be "house breaking tools" was not an expression of opinion as to defendant's guilt), *cert. denied*, — N.C. —, — S.E.2d — (2010).

In any event, assuming that the trial court erred in admitting the challenged portions of Sergeant Schiele's testimony, defendant has failed to demonstrate that "the jury would probably have reached a different verdict if this testimony had not been admitted." *State v. Hammett*, 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006). As we concluded in addressing Dr. Jones' testimony, the State presented overwhelming evidence of defendant's guilt in the form of Anna's detailed description of the sexual acts committed by defendant, defendant's boss' testimony concerning the cell phone conversation between defendant and Anna in which defendant described performing sexual acts with her and defendant's admission to having a relationship with Anna, as well as evidence that Anna, defendant's ex-wife, and his girlfriend were all diagnosed with the same sexually transmitted bacterial infection.

In addition to that evidence, Sergeant Schiele testified that the subscriber information for the "Pomp Daddy" MySpace web page indicated that the account was created by someone with the email address "hondacrzy@yahoo.com." On cross-examination, defendant admitted to creating hondacrzy@yahoo.com as his personal email account. Defendant's admission corroborates Anna's testimony that she and defendant communicated during their "relationship" through the use of a MySpace web page created by defendant. Thus, assuming that the trial court erred in admitting Sergeant Schiele's answers to the prosecutor's hypothetical questions, we conclude that the error did not have a probable impact on the jury's verdict.

No Error.

Judges CALABRIA and GEER concur.

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STATE OF NORTH CAROLINA v. QUINTEN LAVAUGHN BLOUNT, DEFENDANT

No. COA10-352

(Filed 18 January 2011)

**1. Indictment and Information— felony obstruction of justice  
—elevation of charge from misdemeanor to felony—  
subject matter jurisdiction**

The superior court had subject matter jurisdiction to accept defendant's guilty plea to felony obstruction of justice. The indictment on its face was sufficient to elevate the charge from a misdemeanor to a felony under N.C.G.S. § 14-3.

**2. Sentencing— mitigating range—plea arrangement**

The Court of Appeals granted defendant's petition for writ of *certiorari* and concluded that the trial court did not fail to comply with the sentencing procedures under N.C.G.S. § 15A-1024. Although defendant characterized the plea arrangement as requiring the trial court to sentence defendant within the mitigated range, this interpretation was not supported by the plain language of the plea arrangement.

**3. Sentencing— prior record level—miscalculation harmless error**

The trial court committed harmless error by its calculation of defendant's prior record level. The correct calculation of defendant's prior record points did not affect the determination of his prior record level.

**4. Sentencing— restitution—sufficiency of findings—clerical error**

The trial court erred by ordering defendant to pay \$6,225 in restitution, and the order was vacated and remanded. No evidence was presented in support of the restitution worksheet, and defendant did not stipulate to the specified amount. Further, on remand the clerical error on the restitution worksheet listing Williams as an "aggrieved party" should be changed to list him as the "victim."

Appeal by defendant from judgment entered 2 November 2009 by Judge Kenneth F. Crow in Lenoir County Superior Court. Heard in the Court of Appeals 27 October 2010.

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*Attorney General Roy Cooper, by Assistant Attorney General Jennifer M. Jones, for the State.*

*John T. Hall for defendant-appellant.*

HUNTER, Robert C., Judge.

Defendant Quinten Lavaughn Blount appeals from the judgment entered on his guilty plea to felony possession of stolen goods and felony obstruction of justice. Defendant's principal argument on appeal is that the trial court lacked subject-matter jurisdiction to accept his plea to felony obstruction of justice as the indictment is insufficient to elevate the misdemeanor charge to a felony. We conclude that the indictment is sufficient to elevate the charge and thus the trial court had jurisdiction to enter judgment on defendant's guilty plea. With respect to the trial court's restitution order, however, we conclude that it is not supported by sufficient evidence in the record. Accordingly, we vacate and remand the court's restitution order.

**Facts**

The State's summary of the factual basis for defendant's pleas tended to establish that on 7 July 2008, Detective R.A. Pearson, Jr., with the Lenoir County Sheriff's Department, began investigating a break in at Williams' Auto Sale, in Grifton, North Carolina. Detective Pearson spoke with Garland Williams, the owner of the business, who stated that several items were missing from his shop, including a tow dolly, an impact wrench, an air compressor, a sawzall, a mower, a weed-eater, two electric drills, and three car CD players. About a month later, on 8 August 2008, Mr. Williams spotted a red Ford Explorer parked on the side of the road, with the missing tow dolly hitched behind the vehicle and towing a brown Plymouth Acclaim. Although the tow dolly had been re-painted, Mr. Williams recognized it as being the one taken from his shop by the wench he had installed on it. Mr. Williams called the Lenoir County Sheriff's Department and Detective Tim Murray, along with Detective Pearson, came out to the scene. The detectives were able to see an air compressor inside the Explorer, but were unable to confirm that it was the one taken from Mr. Williams's shop because the vehicle was locked. Using the license plate number, the detectives determined that the Explorer was registered to Lindsey Rouse. The detectives were also able to trace the Acclaim to Willie Sutton, who had previously reported the vehicle stolen in Craven County.

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Detective Pearson returned the tow dolly to Mr. Williams, had Webb's Wrecker Service impound the Explorer and Acclaim, and asked to be notified if anyone contacted Webb's to claim the Explorer. On 11 August 2008, Webb's called Detective Pearson and told him that Ms. Rouse wanted to retrieve her vehicle. A detective went to Webb's and interviewed Ms. Rouse, who explained that the Explorer belonged to defendant, but instead of using his real name (Quinten Lavaughn Blount), she identified him as "Quinten Corbett." She also told the detective that defendant had a bill of sale for the tow dolly. When Ms. Rouse and defendant went to Webb's the next day to get the Explorer from the impound yard, they produced a hand-written bill of sale for the tow dolly. Detective Chris Cahoon, who was at Webb's to assist in the investigation, asked Ms. Rouse for permission to search the Explorer. Ms. Rouse consented and Detective Cahoon found several power tools that matched the description of the items taken from Mr. Williams' shop. Detective Cahoon also found inside the Explorer a note stating that Ms. Rouse should tell investigators that the tow dolly belonged to her "boyfriend, Quinten Corbett" and that she let her boyfriend's uncle use the Explorer and tow dolly to pick up the Acclaim, which he had just purchased. The note also indicated that Ms. Rouse should tell investigators that "Mr. Corbett" was living in Florida, but that she would call his mother to see if she could find the bill of sale for the tow dolly.

When Detective Pearson interviewed defendant, he initially said that he had purchased the tow dolly in Ahoskie in 2007 and that his uncle—not he—was using the Explorer and tow dolly to pick up the Acclaim when the vehicles were impounded. Detective Pearson told defendant that the tow dolly had been positively identified by its owner and that several items found in the Explorer matched the description of items taken from the same location from which the tow dolly was taken. Defendant denied taking the tow dolly or any of the other items. Later during the conversation, defendant told Detective Pearson that he had purchased all the items in the Explorer, but was unable to provide any receipts. Defendant also told Detective Pearson that he and another man, Malcolm Smith, had taken the Acclaim from a residence on Highway 55 East. Mr. Smith, who was interviewed separately, admitted to being with defendant when the Acclaim was taken. All the items in the Explorer were seized and taken to the sheriff's office, where Mr. Williams identified the items as the property taken from his shop.

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Defendant, during the entire investigation, told the investigating officers that his name was Quinten Bernard Corbett, and was initially indicted for possession of stolen goods under that name until it was discovered that his legal name was Quinten Lavaughn Blount. Defendant was subsequently charged with one count of possession of stolen goods, one count of possession of a stolen motor vehicle, and two counts of common law obstruction of justice. A hearing was held on 2 November 2009, where defendant pled guilty to felony possession of stolen goods and felony obstruction of justice. The trial court sentenced defendant to a presumptive-range term of eight to 10 months imprisonment and ordered defendant to pay \$6,225.00 in restitution to Mr. Williams. Defendant timely appealed to this Court.

## I

[1] Defendant first argues that the superior court lacked subject-matter jurisdiction to accept his guilty plea to felony obstruction of justice as the indictment was insufficient, on its face, to elevate the charge from a misdemeanor to a felony under N.C. Gen. Stat. § 14-3 (2009). Although the State contends that defendant waived appellate review of this issue by pleading guilty, it is well established that a defendant may challenge the sufficiency of the indictment despite having knowingly and voluntarily pled guilty to the charge. *See State v. McGee*, 175 N.C. App. 586, 587, 623 S.E.2d 782, 784 (2006) (“By knowingly and voluntarily pleading guilty, an accused waives all defenses other than the sufficiency of the indictment.”), *disc. review denied*, 360 N.C. 489, 632 S.E.2d 768 (2006). Where, as here, “an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court.” *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000).

“[A]n indictment is fatally defective when the indictment fails on the face of the record to charge an essential element of the offense.” *State v. Bartley*, 156 N.C. App. 490, 499, 577 S.E.2d 319, 324-25 (2003). Common law obstruction of justice, the offense with which defendant was charged, is ordinarily a misdemeanor. *State v. Preston*, 73 N.C. App. 174, 175, 325 S.E.2d 686, 688 (1985). N.C. Gen. Stat. § 14-3(b) provides that a misdemeanor may be elevated to a felony if the indictment alleges that the offense is “infamous, done in secrecy and malice, or [done] with deceit and intent to defraud . . . .” This Court has held that “[t]o elevate the misdemeanor offense to a felony

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pursuant to G.S. 14-3(b), the indictment must specifically state that the offense was ‘infamous’ or ‘done in secrecy and malice’ or done ‘with deceit and intent to defraud.’ ” *State v. Bell*, 121 N.C. App. 700, 702, 468 S.E.2d 484, 486 (1996) (quoting N.C. Gen. Stat. § 14-3(b)); *accord State v. Rambert*, 116 N.C. App. 89, 93-94, 446 S.E.2d 599, 602 (1994) (“[F]or a conviction to be elevated under N.C. Gen. Stat. § 14-3(b), the indictment must warn the defendant of a possible elevation to felony status with a specific reference to ‘infamy,’ ‘secrecy and malice,’ or ‘deceit and intent to defraud.’ ” (quoting N.C. Gen. Stat. § 14-3(b))), *rev’d in part on other grounds*, 341 N.C. 173, 459 S.E.2d 510 (1995). Where “[t]he indictment . . . fail[s] to notify [the] defendant that the State s[eeks] a conviction for a felony” under N.C. Gen. Stat. § 14-3(b), “the superior court d[oes] not have subject matter jurisdiction over the case.” *Bell*, 121 N.C. App. at 702, 468 S.E.2d at 486; *Preston*, 73 N.C. App. at 176-77, 325 S.E.2d at 688-89.

The indictment in this case alleges in pertinent part that defendant “unlawfully, willfully and feloniously did obstruct justice by providing the false name of Quinton Bernard Corbett during a felony investigation, when in fact his real name is Quinten Lavaughn Blount. *This act was done with deceit and intent to interfere with justice.*” (Emphasis added.) Defendant contends that the discrepancy between § 14-3(b)’s language—“deceit and intent to defraud”—and the indictment’s—“deceit and intent to interfere with justice”—is fatal to the trial court’s jurisdiction. While defendant is correct that the indictment does not use the precise language supplied in § 14-3(b), we believe that the phrase used in the indictment is sufficiently similar to the statute’s to provide adequate notice to defendant that the State intended to seek elevation of the offense to felony status. The indictment, moreover, alleges that defendant committed the act constituting the offense “unlawfully, willfully and feloniously.” *See State v. Haskins*, 160 N.C. App. 349, 355, 585 S.E.2d 766, 770 (explaining that “these words are used to characterize the offense as a felony offense and to put the defendant on notice that he must defend against a felony charge”), *appeal dismissed and disc. review denied*, 357 N.C. 580, 589 S.E.2d 356 (2003).

In *State v. Clemons*, 100 N.C. App. 286, 292, 396 S.E.2d 616, 619 (1990), this Court held that the indictments in that case were sufficient under § 14-3(b) to elevate charges of soliciting obstruction of justice and attempted obstruction of justice to felonies because, in addition to “charg[ing] that the offenses were infamous,” the “indictments detailed [the] defendant’s actions involving elements of deceit

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and intent to defraud.” The indictment in this case similarly “detail[s]” conduct by defendant involving deceit and intent to defraud: “obstruct[ing] justice by providing [a] false name . . . during a felony investigation.” We, therefore, conclude that the indictment in this case is sufficient under § 14-3(b) to allege felony obstruction of justice. The trial court had jurisdiction to accept defendant’s plea to that charge.

## II

[2] Defendant next argues that the trial court failed to comply with the sentencing procedures set out in N.C. Gen. Stat. § 15A-1024 (2009). As an initial matter, we note that a challenge to the procedures followed in accepting a guilty plea does not come within the scope of N.C. Gen. Stat. § 15A-1444 (2009), which specifies the grounds for appeals as of right. *State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006); *State v. Rhodes*, 163 N.C. App. 191, 193, 592 S.E.2d 731, 732 (2004). Consequently, a defendant seeking review of the trial court’s compliance with N.C. Gen. Stat. § 15A-1024 “must obtain grant of a writ of certiorari.” *Carriker*, 180 N.C. App. at 471, 637 S.E.2d at 558. As defendant has requested this Court to “review . . . this issue by writ of certiorari[,]” and the State does not oppose the petition, we grant defendant’s petition and review his contention.

N.C. Gen. Stat. § 15A-1024 provides:

If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

The Supreme Court has explained that N.C. Gen. Stat. § 15A-1024 applies when

the trial judge does not reject a plea arrangement when it is presented to him but hears the evidence and at the time for sentencing determines that a sentence different from that provided for in the plea arrangement must be imposed. Under the express provisions of this statute a defendant is entitled to withdraw his plea and as a matter of right have his case continued until the next term.

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*State v. Williams*, 291 N.C. 442, 446-47, 230 S.E.2d 515, 517-18 (1976) (emphasis omitted). Thus, once the trial court decides to impose a sentence different from the one provided in the plea agreement, the court must (1) inform the defendant of its decision; (2) inform the defendant that he or she may withdraw his or her plea; and (3) if the defendant chooses to withdraw his or her plea, grant a continuance until the next session of court. *State v. Wall*, 167 N.C. App. 312, 314, 605 S.E.2d 205, 207 (2004); *Rhodes*, 163 N.C. App. at 195, 592 S.E.2d at 733.

Defendant argues that the trial court, by sentencing him in the presumptive range rather than the mitigated range, “did not honor [his] plea bargain” with the State. Although defendant characterizes the plea arrangement as requiring the trial court to sentence defendant within the mitigated range, this interpretation is not supported by the plain language of the plea arrangement as written in the transcript of plea:

Defendant shall plead guilty to one count of Possession of Stolen Goods and one count of Common Law Obstruction of Justice. The State shall dismiss all remaining charges and the defendant shall not be further prosecuted for any conduct arising out of this matter. *The State shall not object to punishment in the mitigated range of punishment.*

(Emphasis added.) The terms of the plea arrangement do not provide for a mitigated-range sentence—only that the State would “not object” to such a sentence. There was thus no agreed-upon sentence for the trial court to reject. Defendant’s argument is overruled.

## III

[3] Defendant also argues that the trial court erred in calculating his prior record level. The prior record level worksheet submitted in this case indicates that defendant has one prior Class I felony conviction and four prior Class A1 or misdemeanor convictions. Defendant does not challenge the validity of any of these convictions on appeal. Rather, defendant contends that because Class I convictions are assigned two points each under N.C. Gen. Stat. § 15A-1340.14(b)(4) (2009) and Class A1 and misdemeanor convictions are assigned one point each under N.C. Gen. Stat. § 15A-1340.14(b)(5), the trial court incorrectly determined that defendant had a total of eight points rather than six.

The State acknowledges the error but points out that defendant was assigned a prior record level of III, which required five but not

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more than eight points. N.C. Gen. Stat. § 15A-1340.14(c)(3) (2007).<sup>1</sup> As the correct calculation of defendant's prior record points does not affect the determination of his prior record level, the error is harmless. *See State v. Smith*, 139 N.C. App. 209, 220, 533 S.E.2d 518, 524 (holding that error in calculating defendant's prior record points is harmless if the error does not affect the determination of defendant's prior record level), *appeal dismissed*, 353 N.C. 277, 546 S.E.2d 391 (2000).

## IV

[4] Defendant also argues that the trial court erred by "order[ing] payment of an amount of restitution that was not supported by competent evidence." As a threshold issue, the State contends that defendant failed to preserve this issue for appellate review by not "timely object[ing] when the trial court entered the \$6,225.00 restitution judgment against him . . . ." While it is undisputed that defendant failed to object to the trial court's entry of an award of restitution, this Court has repeatedly held that the issue of restitution is preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18) (2009), which allows for review of sentencing errors where there was no objection at trial. *See State v. Davis*, — N.C. App. —, —, 696 S.E.2d 917, 921 (2010) ("[I]t is well established that a restitution order may be reviewed on appeal despite no objection to its entry."); *State v. Mauer*, — N.C. App. —, —, 688 S.E.2d 774, 777-78 (2010) ("[T]his Court has consistently held that pursuant to N.C. Gen. Stat. § 15A-1446(d)(18) (2007) a defendant's failure to specifically object to the trial court's entry of an award of restitution does not preclude appellate review."); *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) ("While defendant did not specifically object to the trial court's entry of an award of restitution, this issue is deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18)."); *State v. Reynolds*, 161 N.C. App. 144, 148-49, 587 S.E.2d 456, 459-60 (2003) (holding that notwithstanding defendant's failure to object to the trial court's "requiring him to pay . . . restitution," issue was preserved for appellate review pursuant to N.C. Gen. Stat. § 15A-1446(d)(18)).

The amount of restitution ordered by the trial court must be supported by competent evidence presented at trial or sentencing. *State*

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1. N.C. Gen. Stat. § 15A-1340.14(c) was amended in 2009 to require at least six but not more than nine points. *See* 2009 N.C. Sess. Law 555, § 1. As the amended statute "applies to offenses committed on or after" 1 December 2009, and the offenses for which defendant was convicted occurred prior to 1 December 2009, the prior version of N.C. Gen. Stat. § 15A-1340.14(c) governs this case.

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*v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995). Here, during sentencing, the prosecutor presented a restitution worksheet specifying that the State was requesting \$6,225.00 in restitution for Mr. Williams, the owner of the tow dolly and tools taken from his shop. Mr. Williams did not testify and no additional documentation was submitted in support of the worksheet. Neither defendant nor his trial counsel stipulated to the worksheet. A restitution worksheet, unsupported by testimony, documentation, or stipulation, “is insufficient to support an order of restitution.” *Mauer*, — N.C. App. at —, 688 S.E.2d at 778; *see also State v. Swann*, 197 N.C. App. 221, 225, 676 S.E.2d 654, 657-58 (2009) (vacating restitution award where “[t]he victim did not testify[,] . . . the worksheet was not supported by any documentation[, and] [d]efendant did not stipulate to the worksheet”); *State v. Calvino*, 179 N.C. App. 219, 223, 632 S.E.2d 839, 843 (2006) (“Here, at the sentencing hearing, the prosecutor noted that the State had a ‘restitution sheet’ requesting reimbursement from defendant of \$600 for SBI ‘lab work,’ and \$100 to the ‘Dare County Sheriff’s Office Special Funds.’ However, defendant did not stipulate to these amounts and no evidence was introduced at trial or at sentencing in support of the calculation of these amounts. We vacate the restitution order and remand for a hearing on the matter at resentencing.”). As no evidence was presented in support of the restitution worksheet, and defendant did not stipulate to the amount specified, the trial court erred in ordering defendant to pay \$6,225.00 in restitution. We, therefore, vacate the trial court’s restitution order and remand for rehearing on the issue.

For purposes of remanding this case, we note a clerical error on the restitution worksheet. Mr. Williams is listed on the worksheet as an “aggrieved party,” rather than as a “victim.” N.C. Gen. Stat. § 15A-1340.34(a) (2009) defines a “victim” as “a person directly and proximately harmed as a result of the defendant’s commission of the criminal offense.” Mr. Williams, whose property was taken and found in the possession of defendant, meets N.C. Gen. Stat. § 15A-1340.34(a)’s definition of a victim and should be listed as such on the restitution worksheet. *See State v. Davis*, 123 N.C. App. 240, 242-43, 472 S.E.2d 392, 393 (1996) (“[A] court of record has the inherent power to make its records speak the truth and, to that end, to amend its records to correct clerical mistakes or supply defects or omissions therein.”).

Affirmed in part; vacated and remanded in part.

Judges CALABRIA and GEER concur.

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[209 N.C. App. 349 (2011)]

DAVID GROSS, EMPLOYEE, PLAINTIFF v. GENE BENNETT CO., EMPLOYER,  
AMERICAN HOME ASSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA10-29

(Filed 18 January 2011)

**1. Workers' Compensation—no determination of compensable injury—additional medical treatment—Parsons presumption inapplicable**

The Industrial Commission erred in a workers' compensation case by applying the *Parsons* presumption. Where there was no previous finding of compensability by the Industrial Commission, no previous admission of compensability by the employer, and no agreement as to compensability between the parties, the *Parsons* presumption was not applicable.

**2. Workers' Compensation—compensable injury—expert testimony—medical causation—not sufficient**

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff's disk herniation injury was caused by a compensable injury. Where plaintiff's medical expert opinion as to medical causation did not rise above the level of mere possibility, the Industrial Commission's findings of fact as to medical causation were not supported by competent evidence.

Appeal by defendants from an Opinion and Award entered 6 October 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 August 2010.

*Anthony D. Griffin, for plaintiff-appellee.*

*Cranfill Sumner & Hartzog LLP, by James B. Black IV, for defendant-appellants.*

STEELMAN, Judge.

Where there was no previous finding of compensability by the Industrial Commission, no previous admission of compensability by the employer, and no agreement as to compensability between the parties, the *Parsons* presumption is not applicable. Where Dr. Allen's opinion as to medical causation did not rise above the level of mere possibility, the Industrial Commission's findings of fact as to medical causation were not supported by competent evidence.

**GROSS v. GENE BENNETT CO.**

[209 N.C. App. 349 (2011)]

I. Factual and Procedural History

David Gross (“plaintiff”) was working for Gene Bennett Co. (“Bennett”) as a steel fabricator/welder/machinist on 5 March 2007, when he fell through an eight-foot ceiling, falling approximately ten to twelve feet before hitting the concrete floor. Plaintiff was treated at Southeastern Regional Medical Center for his injuries, and was subsequently treated by Dr. Thomas Florian at Southeastern Occupational Healthworks. Dr. Florian released plaintiff to return to full duty on 1 May 2007. Defendants accepted plaintiff’s workers’ compensation claim on a medicals-only basis. Plaintiff sought further treatment from Dr. David R. Allen, an orthopedic surgeon, on 30 August 2007 and 25 March 2008. During the course of his treatment, two MRIs were performed on plaintiff’s lower back. The first MRI, on 17 August 2007, showed degenerative disc disease at L3-4 and L4-5, with a mild disc bulge at L4-5 and L5-S1. A second MRI, on 9 May 2008, showed a disc extrusion or herniation at L4-5.

In an Opinion and Award entered on 6 October 2009, the North Carolina Industrial Commission concluded that plaintiff’s then “current low back condition was a compensable progression from the injuries he sustained in his March 5, 2007 fall.” The Full Commission awarded plaintiff temporary total disability from 6 March 2007 continuing until plaintiff was able to return to work, or until further order of the Commission. Defendants were also ordered to pay for any medical treatment plaintiff received for his low back condition since his release from Dr. Florian’s care on 1 May 2007, and to pay for any future treatment that may be necessary.

Bennett and American Home Assurance Company (collectively “defendants”) appealed on 3 November 2009.

II. Parsons Presumption

[1] Defendants contend that the *Parsons* presumption is not applicable to the facts of this case. We agree.

The Commission’s first conclusion of law states:

Based upon the greater weight of the evidence and medical testimony, particularly assigning greater weight to Dr. Allen’s testimony, the Full Commission concludes that Plaintiff’s current low back condition is a compensable progression from the injuries he sustained in his March 5, 2007 fall. *See Perez v. American Airlines*, 174 N.C. App. 128 (2005).

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In *Parsons v. Pantry Inc.*, this Court held that where the Commission has made a determination that a worker has suffered a compensable injury, there is a presumption that additional medical treatment is causally related to the original injury. 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997). In this situation, the burden of proof is shifted from the plaintiff to the defendant “to prove the original finding of compensable injury is unrelated to her present discomfort.” *Id.* In *Perez v. American Airlines/AMR Corp.*, we held that this presumption was applicable where the employer had filed a Form 60, admitting compensability of the injury. 174 N.C. App. 128, 136, 620 S.E.2d 288, 293 (2005). *Perez* also held that a presumption of continuing disability was created by a Form 21 agreement, citing to *Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 77, 476 S.E.2d 434, 436 (1996), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 169 (1997). *Id.*

In each of these situations there was a determination of compensability of the original injury, either by the Commission (*Parsons*), by admission of the employer (*Perez*), or by agreement of the parties (*Kisiah*). The presumption arose because of the prior determination of compensability.

In the instant case, there was no prior determination of the compensability of plaintiff's injuries, either by the Commission, the admission of the employer, or by agreement of the parties. In this case, Industrial Commission Forms 18, 19, 22, 33 and 33R were filed with the Commission. The parties stipulated that “[d]efendants accepted this claim on a medicals-only basis.” There was no stipulation that plaintiff suffered a compensable injury.

We hold that in the absence of an admission of compensability of an injury by the employer or an agreement between the parties, the *Parsons* presumption cannot arise at the initial hearing on compensability before the Commission. “In a workers' compensation claim, the employee has the [initial] burden of proving that his claim is compensable.” *Holley v. Acts, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (citations and internal quotation marks omitted).

Defendants accepted plaintiff's claim on a medicals-only basis. It has long been the law of this State that acceptance of a claim on a medicals-only basis “cannot in any sense be deemed an admission of liability.” *Biddix v. Rex Mills*, 237 N.C. 660, 664, 75 S.E.2d 777, 781 (1953); *cited with approval in Knight v. Cannon Mills Co.*, 82 N.C. App. 453, 467, 347 S.E.2d 832, 841 (1986) (citations omitted), *disc. review denied*, 318 N.C. 507, 349 S.E.2d 861 (1986); *construed in*

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*Gore v. Myrtle/Mueller*, 362 N.C. 27, 653 S.E.2d 400 (2007) (addressing whether an employer was estopped from asserting that plaintiff's claim was time barred where employer made specific assurances to the injured employee).

We hold that the Commission erred in applying the *Parsons* presumption in this case.

**III. Medical Causation**

[2] Defendants next contend that the Industrial Commission erred in holding that the disc herniation at L4-5 was caused by the 5 March 2007 work accident. We agree.

**A. Requirement of Expert Medical Testimony to Show Medical Causation**

In cases involving complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury. However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation. The evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation.

*Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (internal alternation, citations, and quotation marks omitted); *See also Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). “Although expert testimony as to the *possible* cause of a medical condition is admissible if helpful to the [trier of fact], it is insufficient to prove causation, particularly when there is additional evidence or testimony showing the expert’s opinion to be a guess or mere speculation.” *Holley*, 357 N.C. at 233, 581 S.E.2d at 753 (internal citations and quotation marks omitted).

**B. Findings and Conclusions of the Industrial Commission**

7. Plaintiff presented to Matthew Davis, PA-C on March 6, 2007. Plaintiff described the fall the day before and reported that he had a history of prior back injury in 1997. Upon examination of his low back, Plaintiff's range of motion was limited due to pain, and Mr. Davis noted positive Waddell's signs and positive bilateral straight leg raises. Mr. Davis diagnosed multiple

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contusions and restricted Plaintiff to no lifting; no repetitive bending; no pushing or pulling; no squatting, kneeling, or crawling; and no climbing

....

18. Based on [Dr. Florian's] review of the April 17, 2007 MRI film vis-à-vis the report from the May 9, 2008 MRI, which he found to be "dramatically different," Dr. Florian testified that he believed that Plaintiff had sustained a new injury between the MRIs. Dr. Florian did note disc bulges at L4-5 and L5-S1 on the April 17, 2007 MRI, but he further stated that the L4-5 disc herniation reported on the May 9, 2008 MRI was an "entirely different finding."
19. As Dr. Allen testified, he could not determine that the May 9, 2008 MRI vis-à-vis the April 17, 2007 MRI showed a new injury. As Dr. Allen testified, it is possible that the L4-5 disc herniation seen on the later MRI represents a progression from the condition seen on the earlier MRI. As Dr. Allen further testified, if Plaintiff never had back problems, then fell through a roof and had the acute onset of low back pain, which slowly got worse over time, then "it is very possible . . . even likely . . . that this could be a progression of the condition." Dr. Allen further noted that, if Plaintiff was working and doing heavy lifting without back trouble prior to his March 5, 2007 fall, that would be a significant factor in determining that the disc herniation found on the May 9, 2008 MRI was a progression from the injury sustained in the fall.

....

21. The Full Commission assigns greater weight to the testimony of Dr. Allen than to that of Dr. Florian. Dr. Allen is an orthopedist, while Dr. Florian is not. Dr. Florian's office seems to have taken on a hostile attitude toward Plaintiff from the beginning of his treatment with them, and it appears that Dr. Florian prematurely released Plaintiff from treatment with a premature finding of maximum medical improvement. Also, Dr. Florian was not asked about the possibility that the later MRI finding represented a progression of the condition seen on the earlier MRI.

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The Full Commission went on to conclude that:

Based upon the greater weight of the evidence and medical testimony, particularly assigning greater weight to Dr. Allen's testimony, the Full Commission concludes that Plaintiff's current low back condition is a compensable progression from the injuries he sustained in his March 5, 2007 fall. See *Perez v. American Airlines*, 174 N.C. App. 128 (2005).

C. Analysis

There was a conflict in the medical causation opinions of Dr. Florian and Dr. Allen. The Commission assigned greater credibility to Dr. Allen's opinion, and held that the disc herniation was a compensable injury. Defendants argue that a careful review of Dr. Allen's testimony reveals that he did not testify as to medical causation with sufficient certainty to meet the requirements of *Holley v. Acts, Inc.*, 357 N.C. 228, 581 S.E.2d 750 (2003), and *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 538 S.E.2d 912 (2000).

Upon direct examination by plaintiff's counsel, Dr. Allen testified as follows:

Q. And did you see anything remarkable about that disc?

A. Yes. It showed a L4/5 disc extrusion on it, which is a herniated disc.

Q. But, last year when he took an MRI, it did not show a herniated disc; is that correct?

A. Correct.

Q. But, it did showed [sic] a bulged disc—

A. It showed a mild bulge.

Q. —at that same location?

A. Yes.

Q. In your opinion, is this a new injury?

A. I would not be able to determine that. So, I can't determine whether somebody got hurt or not. It would have to be based upon the patient's history at that point. So, if somebody was in an accident or a car accident or something like that that—I would say it is a new accident.

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If somebody never had back problems before all this, he fell out of a roof or something, had onset—acute onset of back pain that never improved, progressively got worse, it is possible that that disc extrusion could be a progression of the condition we saw on that MRI from the past.

Q. Well, if Mr. Gross fell out of a ceiling in the early spring of 2007, and he was being treated for his back injury—or for injuries, and he never got back—he never got well, would you say that this was an—a furthering of that injury?

MR. BLACK: Objection.

A. Well, you're using the word if. I guess is that—if that's accurate, that he never had problems, the only thing that would make me concerned about that was the initial history. He said that—unless it's an error in my medical records, he was saying that he had problems for ten years prior. So, that would be my only concern about that.

But, if that is an error in my medical records, and if he is basically saying he's never had back problems, he fell out of the roof—fell from the roof, or fell through the roof, and had an acute onset of pain just like I described before, and never had problems before this, and the pain just was always there, slowly getting worse over time, it—it is—it is very possible.

And even—likely if that were the scenario, that this could be a progression of the condition.

Q. Would it clear up any of your doubts if you knew that before this injury—immediately before the alleged injury, Mr. Gross was performing fairly heavy labor?

A. It wouldn't necessarily clear up doubts, just because many people have to work with even painful backs or without hurt. What I would want to know, what would be—what I would like to know is whether he had any previous back problems, and whether he was having any pains at all, prior to this. So, and I don't know the answer to that.

So, if it was—if it was that he was not having any back problems, he's doing heavy lifting, doing really high level of functioning, of work and labor, and not having any back pains, and doing all those things, I think that would be significant, that he were to fall and get hurt, and—and have this constant back pain that never got better, progressively got worse, to the point of

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seeing this most recent MRI, which does show an extension or an extrusion of the disc.

....

Q. But, you wouldn't say that this is a new injury?

A. I cannot determine that.

....

Q. So, unless he describes some sort of traumatic event, there's no way that you could determine that this is a new injury?

A. Right. If he had some type of traumatic event where he was doing a lot better, you know, or doing better, he has a traumatic event and has an onset of numbness. Because the foot numbness when we—you know, is an issue, you know that could link to that MRI.

So, that—you know, in that situation, it would—that would be important for me to know.

The other thing that could go in his favor is if he never got better, if his back was always killing him, it was causing tremendous pain, and progressively over a period of a year or two getting worse. Then, you know, I think that could go, you know, even in the face of no trauma, could—you know, explain that second MRI.

Upon cross-examination by defendants' counsel, Dr. Allen testified as follows:

Q. So, the only history noted in either of your medical records—or your practice's medical records in regards to the back would have indicated—and I'm just gonna quote from your record, "Date of onset was ten years ago?"

A. Yes.

Q. Without an accurate history, and based on the number of times you've seen Mr. Allen (sic), is it possible to give a causation opinion to any degree of medical certainty?

A. No.

Q. You've had a chance to review the CD with the May 9, 2008, MRI report. And is it fair to state that it's a—it's a different presentation than the April 17, 2007?

A. Yes.

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In finding of fact seven, the Commission found that plaintiff had reported a prior back injury in 1997. This finding was consistent with the history plaintiff gave to Dr. Allen on 30 August 2007, where he stated that the date of onset of his back problems was about ten years ago. Each of Dr. Allen's opinions relating to medical causation as to the L4-5 herniated disc were predicated upon plaintiff never having had prior back problems. In fact, at one point Dr. Allen predicated his opinion on the plaintiff's medical history in his records being erroneous. The Commission acknowledged this qualification in Dr. Allen's opinion on two occasions in finding of fact nineteen. However, the Commission chose to ignore this qualification, and hold that the disc herniation was medically related to a compensable injury. Because Dr. Allen's medical causation opinion was expressly qualified by an assumption that plaintiff had no prior back problems, and the Commission found that plaintiff had a prior back problem from 1997, Dr. Allen's medical causation opinion does not rise above the level of possibility or speculation. The evidence does not support the Commission's findings of fact, which in turn do not support its conclusions of law. Plaintiff failed to meet his burden of establishing that the disc herniation injury at L4-5 was caused by a compensable injury. *Holley*, 357 N.C. at 231, 581 S.E.2d at 752 (internal citations and quotation marks omitted).

Because defendants do not challenge the medical causation of plaintiff's injuries between 5 March 2007 and 1 May 2007 (the date plaintiff was released by Dr. Florian to return to full duty), we affirm the Commission's rulings as they pertain to that time period, but reverse its ruling pertaining to the disc herniation injury diagnosed after 1 May 2007.

This matter is remanded to the Commission for entry of a new Opinion and Award consistent with this opinion.

AFFIRMED in part, REVERSED and REMANDED in part.

Judges STEPHENS and HUNTER, JR., Robert N. concur.

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[209 N.C. App. 358 (2011)]

STATE OF NORTH CAROLINA v. KEVIN MICHAEL CHLOPEK

No. COA10-766

(Filed 18 January 2011)

**Search and Seizure— traffic stop—no reasonable suspicion— motion to suppress improperly denied**

The trial court erred in a driving while impaired case by denying defendant's motion to suppress evidence because the officers did not have reasonable suspicion to stop defendant's vehicle.

Appeal by Defendant from order and judgment entered 10 December 2009 by Judge William Pittman and Judge Abraham Penn Jones, respectively, in Wake County Superior Court. Heard in the Court of Appeals 1 December 2010.

*Attorney General Roy Cooper, by Assistant Attorney General Tammera S. Hill, for the State.*

*James N. Freeman, Jr. for Defendant.*

STEPHENS, Judge.

*I. Procedural History*

On 25 April 2008, Defendant Kevin Michael Chlopek was arrested for driving while impaired. Defendant's case was called for hearing on his "Motion to Suppress Evidence" on 4 November 2009 in Wake County Superior Court. The trial court denied Defendant's motion by order entered 10 December 2009, the Honorable William Pittman presiding. Defendant subsequently entered a plea of guilty to the charge of driving while impaired while reserving his right to appeal the denial of his motion to suppress. The trial court entered judgment on 10 December 2009 sentencing Defendant to a suspended sentence, the Honorable Abraham Penn Jones presiding. Defendant gave notice of appeal in open court.

*II. Factual Background*

The evidence presented at the suppression hearing tended to show the following: On 25 April 2008 at approximately 12:05 a.m., Deputies David Chamblee and Phillip Chapman of the Wake County Sheriff's Department were conducting a traffic stop just inside the entrance to the Olde Waverly Place subdivision, a partially- developed subdivision in eastern Wake County. While the officers were conducting the stop, Deputy Chapman noticed another vehicle approach

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the entrance to the subdivision. Deputy Chapman described the vehicle as “a white Chevrolet 1500 single cab, like a construction-style truck. Had a lot of dings and scratches. It appeared to be a construction, which you would normally see, construction-type vehicle[.]” He noted that Defendant was driving the truck and that there was a dog in the truck. Deputy Chapman did not notice anything abnormal about the manner in which the vehicle entered the subdivision and testified that the

[v]ehicle entered the subdivision just like any other vehicles would in that situation.

....

The vehicle proceeded in a normal manner. Driver of the vehicle, I noticed, what drew my attention was that he had a dog in the vehicle.

As he was passing by he seemed a little nervous in his manner of observing us observing him.

Defendant proceeded past the officers toward the undeveloped portion of the subdivision. Deputy Chamblee testified that officers had been put on notice that there had been a large number of copper thefts from subdivisions under construction in the south side of Wake County. However, no such thefts had been reported in the Olde Waverly Place subdivision, nor had any other crimes been reported in that subdivision. When Defendant exited the subdivision 20 to 30 minutes later, Deputy Chapman initiated a traffic stop of Defendant’s vehicle. Deputy Chapman and Deputy Chamblee had not discussed stopping Defendant’s vehicle.<sup>1</sup>

*III. Discussion*

Defendant’s sole argument on appeal is that the trial court erred in denying his motion to suppress because the officers did not have reasonable suspicion to stop Defendant’s vehicle. We agree.

On appeal, we review a trial court’s denial of a motion to suppress to determine “whether the trial court’s findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law.” *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699 (citing *State v. Wynne*, 329 N.C. 507, 522, 406 S.E.2d 812, 820

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1. No evidence was presented regarding what transpired after Defendant was stopped by Deputy Chapman.

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(1991)), *disc. review denied*, 357 N.C. 166, 580 S.E.2d 702 (2003). “[T]he trial court’s findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.” *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citations and quotation marks omitted). We review the trial court’s conclusions of law, however, *de novo*. *State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994).

Our federal and state constitutions protect individuals “against unreasonable searches and seizures.” U.S. Const. amend. IV; N.C. Const. art. I, § 20. A traffic stop is a seizure “even though the purpose of the stop is limited and the resulting detention quite brief.” *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979). Nevertheless, a traffic stop is generally constitutional if the police officer has a “reasonable, articulable suspicion that criminal activity is afoot.” *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968)).

Only unreasonable investigatory stops are unconstitutional. An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.

A court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion to make an investigatory stop exists. The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch.

*State v. Campbell*, 359 N.C. 644, 664, 617 S.E.2d 1, 14 (2005) (internal citations and quotation marks omitted). Thus, “[r]easonable suspicion is a ‘less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.’” *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (quoting *Wardlow*, 528 U.S. at 123, 145 L. Ed. 2d at 576), *cert. denied*, — U.S. —, 172 L. Ed. 2d 198 (2008). Even so, the requisite degree of suspicion must be high enough “to assure that an individual’s reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.” *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979).

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In *State v. Murray*, 192 N.C. App. 684, 666 S.E.2d 205 (2008), a police officer was performing a property check of the Motorsports Industrial Park in Concord at approximately 3:41 a.m. The officer was “patrolling the main road and checking the buildings and parking lots in the area as part of a ‘problem oriented policing project’ begun . . . following reports of break-ins of vehicles and businesses in the Park.” *Id.* at 684, 666 S.E.2d at 206. As the officer rounded a curve on the main road, “he ‘passed a vehicle coming out of the area,’ which he thought was ‘kind of weird,’ as he ‘hadn’t seen the vehicle in any of [his] earlier property checks around the businesses.’” *Id.* at 685, 666 S.E.2d at 206. The officer turned around and pulled behind the vehicle to “‘run its license plate and just see if maybe it was a local vehicle.’” *Id.*

When asked if the vehicle was acting any differently than other cars the officer had stopped in the past, which he had determined were not engaged in any unlawful activity, the officer answered that the vehicle “‘was just leaving the area’” and was not doing anything different. *Id.* at 688, 666 S.E.2d at 208. The officer

conceded that the vehicle was not violating any traffic laws, was not trespassing, speeding, or making any erratic movements, and was on a public street. Moreover, his check of the license plate showed that the vehicle was not stolen and was in fact a rental vehicle from nearby Charlotte.

*Id.* at 685, 666 S.E.2d at 206. Nevertheless, the officer “‘decided to go ahead and do an investigatory traffic stop on [the vehicle] to find out what they were doing in that location.’” *Id.* This Court concluded that the officer

never articulated any specific facts about the vehicle itself to justify the stop; instead, all of the facts relied on by the trial court in its conclusions of law were general to the area, namely, the “break-ins of property at Motorsports Industrial Park . . . the businesses were closed at this hour . . . no residences were located there . . . this was in the early hours of the morning,” and would justify the stop of *any* vehicle there.

*Id.* at 689, 666 S.E.2d at 208.<sup>2</sup> Indeed, the trial court found that the officer “‘had found no broken glass, lights on or other suspicious

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2. Cf. *State v. Watkins*, 337 N.C. 437, 442-43, 446 S.E.2d 67, 70-71 (1994) (finding reasonable suspicion based on the late-night hour of the stop, a car moving without lights in the parking lot of a closed business, the generally rural nature of the area, and

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circumstances at any' of the businesses he had checked, to suggest that there had been a break-in that night.' " *Id.* Thus, this Court held that the trial court's conclusion of law that the officer's stop of the vehicle in question "was justified by a reasonable suspicion based on objective facts" was erroneous, and that the officer's stop of the vehicle "was based only on his 'unparticularized suspicion or hunch' and does not meet the minimal level of objective justification necessary for an investigatory traffic stop." *Id.* Accordingly, this Court reversed the denial of defendant's motion to suppress and remanded the case to the trial court for further proceedings. *Id.* at 690, 666 S.E.2d at 209.

In this case, the trial court made the following findings of fact:

1. Deputy Chamblee was . . . on duty with the Wake County Sheriff's Department on or about April 25, 2008 at 12:05 AM;
2. That Deputy Chamblee was conducting an unrelated traffic stop in the Olde Waverly Subdivision in Fuquay-Varina, North Carolina;
3. That Deputy Chapman was also present during this unrelated traffic stop and was supervising Deputy Chamblee;
4. That during that traffic stop, Deputy Chamblee observed a Chevrolet pickup truck, driven by the Defendant, turn into Olde Waverly Subdivision;
5. That the unrelated traffic stop continued for an additional twenty to thirty minutes;
6. That upon completion of this traffic stop, Deputy Chamblee observed the Defendant begin to exit the subdivision;
7. That although Deputy Chamblee testified there had not been any thefts in that particular subdivision, there had been a large number of copper thefts reported in Wake County;

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a tip that a "suspicious vehicle" had been seen in that location); *State v. Fox*, 58 N.C. App. 692, 695, 294 S.E.2d 410, 412-13 (1982) (reasonable suspicion based on the very early morning hour, the location on a dead-end street with locked businesses in an area with a high incidence of property crime, the appearance of the driver contrasted with the nature of the vehicle, the driver's apparent attempt to avoid the officer's gaze, and the officer's belief that one of the businesses had been broken into that same night), *aff'd per curiam*, 307 N.C. 460, 298 S.E.2d 388 (1983); *State v. Tillett*, 50 N.C. App. 520, 521-24, 274 S.E.2d 361, 362-64 (reasonable suspicion based on late hour and bad weather at time of stop, location on one-lane dirt road in "heavily wooded, seasonably unoccupied" area, reports of "firelighting" deer, and the fact that officer did not observe an inspection sticker on the vehicle), *appeal dismissed*, 302 N.C. 633, 280 S.E.2d 448 (1981).

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8. That Deputy Chamblee described the Defendant's vehicle as "an older dinged-up work-type truck typical of a construction vehicle;"
9. That Deputy Chamblee testified that the Olde Waverly Subdivision was a partially completed housing development and some lots within the subdivision are still under construction;
10. That Deputy Chapman initiated a traffic stop by waiving his flashlight and putting his hands in the air.

Defendant does not challenge any of the trial court's findings of fact, and, thus, the findings "are deemed to be supported by competent evidence and are binding on appeal." *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36, *disc. review denied*, 358 N.C. 240, 594 S.E.2d 199 (2004). Based on these findings of fact, the trial court concluded:

1. The stop was made based on the following totality of the circumstances: the Defendant's presence at that time of night in a partially developed subdivision, driving a vehicle described as a "work truck," and during a time where numerous copper thefts had been reported in Wake County;
2. Based on the totality of the circumstances, Deputy Chapman had reasonable suspicion to believe that criminal activity was afoot.

Defendant argues that the findings of fact do not support the conclusion of law that "[b]ased on the totality of the circumstances, Deputy Chapman had reasonable suspicion to believe that criminal activity was afoot." We agree.

Here, as in *Murray*, Deputy Chamblee did not articulate, and the trial court did not find, any specific facts about the vehicle itself which would justify the stop. Deputy Chamblee testified that Defendant's "construction-style truck" was the type of vehicle "you would normally see" in a construction area. Moreover, Defendant's "[v]ehicle entered the subdivision just like any other vehicle[] would in that situation" and "proceeded in a normal manner." In fact, what actually drew Officer Chamblee's attention to Defendant's vehicle "was that [Defendant] had a dog in the vehicle."<sup>3</sup>

Instead, as in *Murray*, the facts relied upon by the trial court in concluding that reasonable suspicion existed were general to the

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3. "Dogs love to go for rides. A dog will happily get into any vehicle going anywhere." Dave Barry (humor columnist and Pulitzer Prize winning author).

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area, namely, “Defendant’s presence at that time of night in a partially developed subdivision . . . during a time where numerous copper thefts had been reported in Wake County.”<sup>4</sup> As in *Murray*, such general findings do not support the trial court’s conclusion of law that “Deputy Chapman had reasonable suspicion to believe that criminal activity was afoot.” Accordingly, Deputy Chapman’s stop of the vehicle based only on his “unparticularized suspicion or hunch” does not meet the minimal level of objective justification necessary for an investigatory traffic stop. *Campbell*, 359 N.C. at 664, 617 S.E.2d at 14 (citations and quotation marks omitted). Therefore, we reverse the denial of Defendant’s motion to suppress and remand this case to the trial court for further proceedings.

REVERSED and REMANDED.

Judges STEELMAN and HUNTER, JR. concur.



LANCE COOK, PLAINTIFF v. LOWE'S HOME CENTERS, INC., DDP HOLDINGS, INC.,  
AND MI-DE, INC., DEFENDANTS

No. COA10-88

(Filed 18 January 2011)

**Workers’ Compensation—foreign award—subrogation lien in  
North Carolina reduced—no abuse of discretion**

The trial court did not abuse its discretion by applying North Carolina law and reducing the amount of a subrogation lien against a Tennessee workers’ compensation award. Remedial rights are determined by the law of the forum.

Appeal by intervenor from judgment entered 19 October 2009 by Judge Ralph Walker in Guilford County Superior Court. Heard in the Court of Appeals 1 September 2010.

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4. We further note that while the officer in *Murray* was patrolling the Park as part of increased security measures implemented “following reports of break-ins of vehicles and businesses *in the Park[.]*,” *Murray*, 192 N.C. App. at 684, 666 S.E.2d at 206 (emphasis added), Deputy Chamblee was not aware of any reports of copper thefts specifically in the Olde Waverly Place subdivision nor any reports of other crimes committed in that subdivision.

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*Golding, Holden & Pope, L.L.P., by Elizabeth A. Sprenger, for intervenor-appellant.*

*Charles G. Monnett, III & Associates, by Randall J. Phillips, for plaintiff-appellee.*

BRYANT, Judge.

Because the trial court acted within its discretion to reduce an insurance carrier's lien on plaintiff's recovery from a third-party tortfeasor pursuant to North Carolina law, we affirm the order of the court.

*Facts*

Plaintiff-appellee Lance Cook sustained an injury by accident on 19 December 2005, while working for Oryan Group, Inc., (the Oryan Group) on the premises of Lowe's Home Improvement in Greensboro, North Carolina. The Oryan Group is a Tennessee corporation. Due to the severity of his injuries, Cook was unable to return to work. Thereafter, with the approval of the Chancery Court of Tennessee, he entered into a lump-sum worker's compensation settlement with the Oryan Group.

On 19 November 2008, in Guilford County Superior Court, Cook filed a complaint against defendants (Lowe's Home Centers, Inc., and vendors DDP Holdings, Inc., and MI-DE, Inc.), alleging the injuries he sustained in the 19 December 2005 incident were the result of the negligence of Defendants. Cook claimed damages in excess of \$10,000.00. On 5 January 2009, Hartford Insurance, the worker's compensation carrier for the Oryan Group, filed a notice of appearance as an intervenor. After Cook reached a joint settlement with defendants for \$220,000.00, he dismissed with prejudice the action against Defendants.

On 5 October 2009, Cook filed a motion in Guilford County Superior Court to reduce or extinguish any workers' compensation lien of his employer, or its insurance carrier, on the proceeds of his settlement. Cook asserted that, pursuant to an agreement reached with the Oryan Group and Hartford Insurance under Tennessee law, he received workers' compensation medical benefits amounting to \$34,553.19 and indemnity benefits of \$106,520.25, for a total of \$141,073.54. Cook requested that the trial court "exercise its discretionary power to extinguish any liens that are or may be held by [the Oryan Group] (or [Hartford Insurance]) because the lien against the third-party proceeds impedes [Cook]'s ability to be adequately

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compensated for his injuries, and would work an extreme and undue hardship upon him in the future.”

On 5 October 2009, Hartford Insurance filed a Memorandum of Law in Opposition to Plaintiff’s Motion to Reduce or Extinguish Workers’ Compensation Lien requesting that the court deny Cook’s motion. In its memorandum, Hartford asserted the following:

[T]he workers’ compensation code in the State of Tennessee specifically provides that the employer (or its carrier) shall have a subrogation lien against a recovery by the worker against a negligent third party and the employer may intervene in any action to protect and enforce such lien.

On 19 October 2009, after hearing the arguments of counsel, the trial court concluded that North Carolina law applied to the issue of reducing or eliminating the workers’ compensation lien and that, under the circumstances of this case, the lien should be reduced to \$30,000.00. Hartford Insurance appeals.

On appeal, Hartford Insurance challenges the trial court’s ruling that North Carolina law applied to the issue of reduction or elimination of the workers’ compensation subrogation lien. Hartford argues that Tennessee law would not permit reduction of the subrogation lien and that Tennessee law should be applied here. We disagree.

Under Tennessee law, “[t]he legislative intent is to reimburse an employer for payments made under a Workmen’s Compensation award from the net recovery obtained by the employer [sic] or those to whom his right of action survives, to the extent of employer’s total obligation under the Compensation Act.” *Beam v. Maryland Casualty Co.*, 477 S.W.2d 510, 513 (Tenn. 1972) (internal quotations and emphasis omitted) (discussing Tenn. Code Ann. § 50-6-112(c)<sup>1</sup>).

As to substantive laws, or laws affecting the cause of action, the lex loci—or law of the jurisdiction in which the transaction occurred or circumstances arose on which the litigation is based—will govern; as to the law merely going to the remedy, or procedural in its nature, the lex fori—or law of the forum in which the remedy is sought—will control.

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1. Tenn. Code Ann. § 50-6-112(c)(1) (2009) “In the event of a recovery against the third person by the worker . . . by judgment, settlement or otherwise, and the employer’s maximum liability for workers’ compensation under this chapter has been fully or partially paid and discharged, the employer shall have a subrogation lien against the recovery, and the employer may intervene in any action to protect and enforce the lien.”

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*Charnock v. Taylor*, 223 N.C. 360, 361, 26 S.E.2d 911, 913 (1943) (citing *Howard v. Howard*, 200 N.C., 574, 158 S.E., 101; *Farfour v. Fahad*, 214 N.C., 281, 199 S.E., 521). Where a lien is intended to protect the interests of those who supply the benefit of assurance that any work-related injury will be compensated, it is remedial in nature. *See generally Carolina Bldg. Servs.' Windows & Doors, Inc. v. Boardwalk, LLC*, 362 N.C. 262, 264, 658 S.E.2d 924, 926 (2008). A statute that provides a remedial benefit “must be construed broadly in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained.” *Id.* (citation omitted).

Under North Carolina law “[a]n employer’s statutory right to a lien on a recovery from the third-party tort-feasor is mandatory in nature . . . .” *Radzisz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997) (citing *Manning v. Fletcher*, 102 N.C. App. 392, 400, 402 S.E.2d 648, 652 (1991), *aff’d per curiam*, 331 N.C. 114, 413 S.E.2d 798 (1992)). However, “[a]fter notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer’s lien . . . .” N.C. Gen. Stat. § 97-10.2(j) (2009).

There is no mathematical formula or set list of factors for the trial court to consider in making its determination, *In re Biddix*, 138 N.C. App. 500, 502, 530 S.E.2d 70, 71, *disc. review denied*, 352 N.C. 674, 545 S.E.2d 418 (2000); the statute plainly affords the trial court discretion to determine the appropriate amount of defendant’s lien. The exercise of discretion requires that the court “make a reasoned choice, a judicial value judgment, which is factually supported.” *Allen v. Rupard*, 100 N.C. App. 490, 495, 397 S.E.2d 330, 333 (1990).

*Wood v. Weldon*, 160 N.C. App. 697, 700, 586 S.E.2d 801, 803 (2003), *disc. rev. denied*, 358 N.C. 550, 600 S.E.2d 469 (2004). Therefore, we review the trial court’s judgment for abuse of discretion.

Here, Cook, an employee of the Oryan Group, a Tennessee corporation, sustained an injury in the course of performing the duties of his employment on the premises of Lowe’s Home Improvement in Greensboro, North Carolina. Before a Chancery Court of Tennessee, Cook and the Oryan Group acknowledged Tennessee Workers’ Compensation Law applied to them at the time of his injury. Cook and the Oryan Group petitioned the Chancery Court pursuant to Tennessee Workers’ Compensation Statutes for, and thereafter received, a lump sum settlement wherein Cook recovered from his

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employer and Hartford Insurance \$97,397.00 for permanent-partial disability of 75% to the body as a whole and ongoing medical treatment of his injury by authorized, pre-approved panel physicians. Subsequently, Cook filed a negligence action against defendants in Superior Court in Guilford County, North Carolina. Hartford Insurance intervened to enforce a subrogation lien against any recovery. Cook and defendants settled the North Carolina negligence claim for \$220,000.00. Cook filed a motion in the Superior Court to reduce or extinguish the lien pursuant to N.C. Gen. Stat. § 97-10.2(j), which Hartford Insurance opposed by asserting that Tennessee law applied. However, after a hearing, the trial court entered an order reducing the amount of the lien to \$30,000.00 pursuant to N.C.G.S. § 97-10.2(j).

We note that Tennessee public policy, as codified in its workers' compensation statutes, does not preclude an employee who receives workers' compensation benefits from pursuing negligence claims against third-party tortfeasors, and allows employers to file a subrogation lien against any recovery. *See Tenn. Code Ann. § 50-6-112(c)(1)* (2009). Here, Hartford Insurance was not denied the right to file a lien in North Carolina. In its brief, Hartford Insurance acknowledges that Tennessee law has not been applied by North Carolina courts in the area of subrogation; nevertheless, Hartford Insurance argues that Tennessee law applies and does not allow the North Carolina trial court to reduce the lien. However, as stated earlier, remedial rights are determined by the law of the forum. In this case the forum is North Carolina. *See Charnock*, 223 N.C. at 361-62, 26 S.E.2d at 913.

The North Carolina subrogation statute at issue here gives the court discretion to consider many factors, including "any other factors the court deems just and reasonable, in determining the amount of the employer's lien". N.C.G.S. § 97-10.2(j). In his motion to reduce or extinguish the lien, Cook set forth the significant injuries he suffered, including impairment of his ability to earn wages. He also emphasized to the court that his worker's compensation award was "grossly insufficient and inadequate" to compensate him for his disability. After a hearing on the motion the trial court entered its ruling reducing Hartford's lien to \$30,000. We hold the trial court acted within, and did not abuse, its discretion in applying North Carolina law and reducing the amount of Hartford Insurance's subrogation lien pursuant to N.C.G.S. § 97-10.2(j).

Affirmed.

Judges STEELMAN and BEASLEY concur.

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[209 N.C. App. 369 (2011)]

MITCHELL, BREWER, RICHARDSON, ADAMS, BURGE & BOUGHMAN, PLLC; GLENN B. ADAMS; HAROLD L. BOUGHMAN, JR.; AND VICKIE L. BURGE, PLAINTIFFS V. COY E. BREWER, JR.; RONNIE A. MITCHELL; WILLIAM O. RICHARDSON; AND CHARLES BRITTAINE, DEFENDANTS

No. COA09-1020

(Filed 1 February 2011)

**1. Appeal and Error— preservation of issues—failure to raise  
in business court—lack of verification of complaint not  
jurisdictional**

Plaintiffs' motion to strike footnote two in defendant cross-appellees' brief was granted under N.C. R. App. P. 10. Lack of verification under N.C.G.S. § 1A-1, Rule 23(b) was not jurisdictional, and defendants' arguments concerning lack of verification of the complaint were waived because they were not raised before the business court.

**2. Appeal and Error— interlocutory orders and appeals—  
Rule 54(b) certification—no just reason for delay—avoiding  
piece-meal litigation**

Even though the Court of Appeals was not bound by the business court's N.C.G.S. § 1A-1, Rule 54(b) certification, in its discretion it reviewed the parties' appeals from interlocutory orders because there was no just reason for delay and to avoid piece-meal litigation given the multiple interrelated claims and counter-claims brought forth by the parties.

**3. Jurisdiction— standing—derivative claims—individual claims**

The business court's summary judgment rulings on standing in a case concerning the operation and breakup of a law firm were affirmed and reversed. Plaintiffs had standing to bring their derivative claims, but not their individual claims. Defendants had standing to bring their counterclaims on behalf of the law firm, but not their individual counterclaims.

**4. Corporations— dissolution of law firm—derivative action—  
individual claims**

The business court erred by granting partial summary judgment in favor of defendants on the basis of equitable estoppel, and the case was remanded to the business court for granting of summary

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judgment in favor of plaintiffs on the issue of judicial dissolution under N.C.G.S. § 57C-6-02, for a decree of dissolution, and directing the winding up of the law firm under N.C.G.S. § 57C-6-02.3. The business court also erred by granting defendants' motion for summary judgment dismissing plaintiffs' derivative claims for constructive fraud/breach of fiduciary duty and unfair and deceptive trade practices, and those claims were remanded for further proceedings. Further, the business court erred by ruling that defendants' counterclaims on behalf of the law firm for breach of fiduciary duty, conversion/misappropriation of law firm assets, unjust enrichment, constructive trust, equitable lien, and/or resulting trust, and breach of fiduciary duty/*ultra vires* were moot, and those claims were remanded for future proceedings. Defendants' counterclaims for breach of fiduciary duty and unjust enrichment could also go forward because the business court made no rulings on these counterclaims.

Appeal by plaintiffs and defendants from opinion and order entered 31 March 2009 by Judge John R. Jolly, Jr. in Special Superior Court for Complex Business Cases, Cumberland County. Heard in the Court of Appeals 27 January 2010.

*Everett, Gaskins, Hancock & Stevens, LLP, by E.D. Gaskins, Jr., and Louis E. Wooten, III, for plaintiff-appellants.*

*Coy E. Brewer, Jr., for defendant-appellants.*

STROUD, Judge.

An old saying declares that “the cobbler’s children have no shoes.” Lawyers may suffer from the same problem, if they are too busy dealing with their clients’ legal affairs to address their own. This case arises because the members of a law firm organized as a PLLC did not adopt an operating agreement or any other documents governing the operation of the PLLC. In their actions and communications relevant to the individual plaintiffs’ cessation of practice with the individual defendants, the parties at times seem to treat their business as a partnership and at other times as a PLLC, and certainly a PLLC has elements of both types of business entities. *See Hamby v. Profile Products, L.L.C.*, 361 N.C. 630, 636, 652 S.E.2d 231, 235 (2007) (“An LLC is a statutory form of business organization . . . that combines characteristics of business corporations and partnerships.” (quotation marks omitted)). Plaintiffs’ theory of this case is based upon their

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argument that when the law firm broke up, they did not withdraw from the PLLC, but the PLLC must be dissolved pursuant to N.C. Gen. Stat. § 57C-6-02; defendants' theory is that plaintiffs withdrew from the PLLC, which did not dissolve, nor is it subject to judicial dissolution based upon the plaintiffs' actions. All of the parties' many claims, counterclaims, and defenses stand or fall based upon the answer to the question of whether this is a case of dissolution or withdrawal.

Glenn B. Adams, Harold L. Boughman, Jr., and Vickie L. Burge as individual members of the law firm of Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC ("the PLLC") and derivatively on behalf of the PLLC (collectively referred to as "plaintiffs") appeal from the business court's order granting partial summary judgment in favor of defendants Coy E. Brewer, Jr., Ronnie A. Mitchell, William O. Richardson, and Charles Brittain on the basis of equitable estoppel. Defendants Brewer and Mitchell (collectively referred to as "defendants") appeal from the business court's denial of their motion for summary judgment based on plaintiffs' lack of standing. For the following reasons, we affirm the business court's ruling on partial summary judgment as to standing, reverse the business court's ruling on partial summary judgment as to equitable estoppel, and remand for further proceedings.

### I. Background

Most of the facts surrounding the operation and breakup of the PLLC are undisputed. Plaintiffs Adams, Burge, and Boughman and defendants Brewer, Mitchell, and Richardson began practicing law together in 2000, as a North Carolina Professional Limited Liability Company (referred to herein as "the PLLC"). Defendant Brittain became a member of the PLLC in 2003. The parties never entered into a written operating agreement or any other written documents or agreements setting forth their rights and responsibilities as members of the PLLC during the time when they practiced law together.

On 14 June 2005, the members met to discuss the economic performance of the PLLC. Defendant Brewer raised questions as to the revenues generated by plaintiffs. Plaintiffs' understanding was that defendant Brewer wished to change the percentages for distribution of the PLLC's profits. At some point during the meeting, plaintiff Adams stood up and said, "I see where this is going. I'm out of here[,]" and clarified that he "meant [he was] out of the firm[,]" and for them to "[d]raw the papers up." A few minutes after plaintiff Adams left, plaintiff Boughman said, "Well, I'm going too[,]" and also left the

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room. Following his departure, plaintiff Adams sent an email to the PLLC members stating: “i [sic] would expect my share of revenue and compensation to equal my share of ownership . . . that would include any revenue from this day forward. please [sic] let me know who i [sic] need to speak with concerning my leaving the firm.” Before the end of June 2005, plaintiff Burge also informed defendants that she was leaving the PLLC and would join the other two plaintiffs in forming a new law practice.

Following these events, plaintiffs began making plans to establish a new law firm. Sometime around late June or early July 2005, plaintiff Adams and defendant Brewer met to discuss the PLLC. Plaintiffs Burge and Boughman had picked plaintiff Adams to represent them at this meeting and defendants Mitchell, Richardson, and Brittain had chosen defendant Brewer to represent them. Plaintiff Adams and defendant Brewer agreed on some of the material issues related to the PLLC breakup, including the distribution of office furnishings and equipment, and renting office space. However, they could not come to an agreement on the division of financial assets and liabilities of the PLLC, as plaintiffs believed they were entitled to a share of the future contingent fees generated by cases pending prior to 14 June 2005, and defendant Brewer “firmly disagreed with that.”

On or about 8 July 2005, defendant Brewer sent a memorandum entitled “Winding up of affairs; dissolution of partnership” (“the Brewer memo”) to the members of the PLLC. The Brewer memo explained that “[i]n the absence of any agreement concerning the withdrawal from our law firm of [plaintiffs], the remaining members of the firm are effectuating a winding up of the operation of the law firm as it was previously constituted which we firmly believe to be in all respects fair and equitable.” Further, the Brewer memo stated that defendants had paid off the PLLC’s debts, including lines of credit and other PLLC expenses, with proceeds from a class action case managed by defendants Mitchell and Brewer. The Brewer memo also stated that defendants were distributing the remaining assets to the members based on their membership interests. The Brewer memo further claimed that the disputed pending contingent fee cases had “no ascertainable present value” and that plaintiffs would be reimbursed for the expenses that the PLLC advanced through loans related to the contingent cases if the PLLC recovered a fee from that individual contingent fee case according to the “agreed compensation formula.” Enclosed in copies of the Brewer memo sent to plaintiffs were checks for the amounts to be distributed to plaintiffs under the terms of the

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Brewer memo. Plaintiffs never cashed these checks. The Brewer memo repeatedly referred to plaintiffs as “withdrawing members” but also stated that defendants are “winding up” the PLLC. In his deposition, defendant Brewer explained that he was using these terms in a “non-technical sense[.]” Defendant Brewer explained that by the term “withdrawal” he meant that “[plaintiffs] made it clear to me that they no longer wanted to practice law with me and wanted instead to practice law together and separate and apart from me and my law practice.” Defendant Brewer never discussed the content of the Brewer memo with plaintiffs. Defendant Brewer also stated that the PLLC received a fee from one of the disputed contingent fee cases but had not reimbursed plaintiffs their shares of the expenses from that case, as the Brewer memo had described, because he knew plaintiffs had not negotiated the checks tendered with the Brewer memo and issuing reimbursement checks would have been “futile.”

On 17 August 2005, plaintiff Boughman wrote a letter to a BB&T bank representative informing the bank that “the law firm previously known as Mitchell, Brewer, Richardson, Adams, Burge and Boughman [had] dissolved[,]” to request documentation “showing that all of the debts owed to BB&T by [the PLLC members] had been satisfied and cancelled, and to inform the bank that plaintiffs “do not consent to any funds being lent on any notes that we executed.” Defendants took steps to close the PLLC consistent with State Bar rules but did not complete that process due to a computer crash. Plaintiffs’ counsel sent defendants a letter dated 6 January 2006 to set up a time to discuss the financial issues related to the PLLC’s breakup, including the disputed contingent fee cases, and another follow-up letter, dated 21 June 2006, stating that plaintiffs viewed the breakup as a dissolution.

On 5 July 2006, plaintiffs filed suit against defendants Brewer, Mitchell, Richardson, and Brittain. Plaintiffs’ complaint set forth claims for (1) an accounting to the PLLC, (2) an accounting to plaintiffs, (3) demand for liquidating distribution, (4) constructive fraud/breach of fiduciary duty, and (5) unfair and deceptive trade practices. Plaintiffs also sought a judicial dissolution of the PLLC. Plaintiffs raised these claims individually and derivatively on behalf of the PLLC. The case was designated a complex business case by order from the Chief Justice of the North Carolina Supreme Court and was assigned to the Business Court. Plaintiffs amended their complaint three times, on or about 7 August 2006, 23 May 2007, and 17 February 2009. On 1 November 2006, defendants moved to dismiss plaintiffs’

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complaint. By order dated 8 May 2007, the business court denied defendants' motion to dismiss. On 13 June 2007, defendants filed their answer, raising multiple defenses and the following counter-claims: (1) a declaratory judgment that plaintiffs withdrew from the PLLC; (2) a declaratory judgment that plaintiffs were equitably estopped from denying that they agreed to a dissolution of the PLLC pursuant to the terms in the Brewer memo; (3) in the alternate, breach of fiduciary duty; (4) the conversion/misappropriation of the PLLC assets; (5) unjust enrichment for failure to account to the PLLC; (6) constructive trust, equitable lien and/or resulting trust; (7) breach of fiduciary duty in connection with "the defense of [a] malpractice action[;]" (8) unjust enrichment in connection with "the defense of [a] malpractice action[;]" (9) breach of fiduciary duty/*ultra vires* act; and (10) demand for statutory distribution of assets. On 19 October 2007, the business court entered a "Revised Consent Order Modifying Cases Management Order[,] which limited discovery and initial motions for partial summary judgment to the issues of withdrawal, dissolution, terms of dissolution, estoppel, the parties' relationship with the PLLC, and "the scope of any remaining issues in dispute." In accord with that order, both parties filed motions for partial summary judgment, with supporting deposition transcripts and exhibits, on 9 January 2008. Plaintiffs' motion requested judicial dissolution and dismissal of defendants' counterclaims "predicated on the proposition that no such dissolution occurred." Defendants' motion requested an order declaring that plaintiffs withdrew from the PLLC, the PLLC did not dissolve, plaintiffs are estopped from denying they withdrew from the PLLC, and plaintiffs are estopped from asserting that dissolution occurred on any terms other than the terms in the "Brewer Memo." The business court heard arguments on these motions. On 4 March 2008, plaintiffs filed a motion for preliminary injunction to enjoin defendants from disbursing future contingent fees and cost reimbursements received from the disputed contingent fee cases that were subject of the litigation. By order filed 9 April 2008, the business court denied plaintiffs' motion for preliminary injunction to enjoin Defendants On 15 August 2008, defendants filed a second motion for summary judgment arguing that the PLLC lacked standing to bring this action on its own behalf and individual plaintiffs lacked standing to bring this action derivatively on behalf of the PLLC. Defendants requested the business court grant summary judgment against the PLLC and plaintiffs on all claims. No arguments were held on defendants' second motion.

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On 31 March 2009, the business court issued its opinion on all pending motions for summary judgment. As to the issue of standing, the business court deemed the individual plaintiffs to have been members of the PLLC at the time the action was filed. The business court granted defendants' motion for partial summary judgment and dismissed plaintiffs' individual claims for an accounting to the PLLC (claim one), demand for liquidating distribution (claim three), constructive fraud/breach of fiduciary duty (claim four), and unfair and deceptive trade practices (claim five) for lack of standing. The business court denied defendants' summary judgment motion as to standing for the individual plaintiffs' claim for an accounting to plaintiffs (claim two). The business court also denied defendants' motion for partial summary judgment as to standing for plaintiffs' derivative claims for an accounting on behalf of the PLLC (claim one), demand for liquidating distribution (claim three), constructive fraud/breach of fiduciary duty (claim four), and unfair and deceptive trade practices (claim five).

As to the substantive issues, the business court first granted plaintiffs' motion for partial summary judgment as to defendants' counterclaim one for a declaratory judgment that plaintiffs withdrew from the PLLC and held that plaintiffs had not withdrawn from the PLLC pursuant to N.C. Gen. Stat. § 57C-5-06. As to the remainder of defendants' counterclaim one, the business court denied summary judgment as "there exist[ed] genuine issues of material fact[.]". As to defendants' second counterclaim for a declaratory judgment, the business court granted partial summary judgment for defendant, and based upon application of the doctrine of equitable estoppel, declared that based on plaintiffs' actions plaintiffs' were estopped from denying their withdrawal from the PLLC as of 30 June 2005 and were to be compensated based on the "fair value" of the cases as of this departure date. Based on this ruling, the business court held that defendants' motion for partial summary judgment as to their counterclaims of breach of fiduciary duty (counterclaim three), conversion/misappropriation of PLLC assets (counterclaim four), unjust enrichment (counterclaim five), constructive trust, equitable lien, and/or resulting trust (counterclaim six), breach of fiduciary duty/*ultra vires* act (counterclaim nine), and demand for statutory distribution of assets (counterclaim ten) were moot as they were brought in the alternative "[i]f it [was] determined that the individual Plaintiffs [had] not withdrawn from the Firm[.]". The business court granted defendants' motion for partial summary judgment dismissing

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plaintiffs' derivative claims for accounting to the PLLC (claim one), demand for liquidating distribution (claim three), constructive fraud/breach of fiduciary duty (claim four), and unfair and deceptive trade practices (claim five), finding "no genuine issue of material fact[.]". The business court denied defendants' motion for partial summary judgment to dismiss plaintiffs' individual claim for an accounting to plaintiffs (claim two) as there was a genuine issue of material fact as to the fair value of the individual plaintiffs' distributable interests in the PLLC as of 30 June 2005. The business court made no decision as to defendants' counterclaims seven and eight which related to "the defense of [a] malpractice action[.]". Plaintiffs and defendants Brewer and Mitchell filed notices of appeal.<sup>1</sup> On 16 December 2009, plaintiffs filed with this Court a motion to strike a portion of "Defendant-Cross Appellee's Brief."

## II. Plaintiffs' Motion to Strike

[1] We first address plaintiffs' motion to strike footnote two in "Defendant-Cross Appellee's Brief" ("footnote two") pursuant to N.C.R. App. P. 10 and 37 on the basis that this footnote contains an argument based on Rule 23 of the North Carolina Rules of Civil Procedure that was not "(1) presented to the trial court or (2) reflected in any of Defendants' assignments of error." Defendants' footnote two states that "this Court may properly order remand for entry of judgment in favor of Defendants" because plaintiffs failed to file a verified complaint in their derivative action alleging they were members of an unincorporated association, in violation of Rule 23(b) of the North Carolina Rules of Civil Procedure. Footnote two concludes that this violation "alone provides this Court the ground for dismissal" of plaintiffs' derivative action. N.C.R. App. P. 10(b)(1) states that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." Plaintiffs are correct that there is no indication in the record of any argument based on Rule 23 to the business court. Therefore, this issue is not properly before this Court and we may allow plaintiffs' motion to strike defendants' N.C. Gen. Stat. § 1A-1, Rule 23 argument contained in footnote two of "Defendant-Cross Appellee's Brief" pursuant to N.C.R. App. P. 10(b)(1).

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1. Defendants Richardson and Brittain did not appeal from the business court's summary judgment ruling and are not parties to this appeal.

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However, defendants contend that failure to verify the complaint is jurisdictional and parties to an appeal may raise the issue of jurisdiction for the first time on appeal. Although defendants are correct that matters of subject matter jurisdiction may be raised at any time, *see Wood v. Guilford County*, 355 N.C. 161, 164, 558 S.E.2d 490, 493 (2002), the failure to verify the complaint is not a jurisdictional defect. This argument was rejected by our Supreme Court in *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990). In *Shaw*, the plaintiffs filed an unverified complaint in their shareholder derivative action. *Id.* at 530, 398 S.E.2d at 447. The defendants, citing N.C. Gen. Stat. § 1A-1, Rule 23(b), argued “that in order for the trial court to have had subject matter jurisdiction over this shareholders’ derivative suit the complaint was required to be verified when originally filed, and that it is not sufficient to verify the complaint after it is filed.” *Id.* The Court rejected this argument and held that “because N.C.G.S. § 1A-1, Rule 23(b) addresses the procedure to be followed in, and not the substantive elements of, a shareholder’s derivative suit, plaintiffs’ failure to comply with the verification requirement at the time the complaint was filed is not a jurisdictional defect.” *Id.* at 531, 398 S.E.2d at 447. The Court went on to conclude that “the defendants have waived their objection by failing to raise the issue of verification until this, the fourth time the case has been heard in the appellate division.” *Id.* Therefore, lack of verification pursuant to N.C. Gen. Stat. § 1A-1, Rule 23(b) is not jurisdictional and defendants’ arguments as to the lack of verification of the complaint are waived as they were not raised before the business court. Accordingly, defendants’ argument is overruled and we grant plaintiffs’ motion to strike footnote two in “Defendant-Cross Appellee’s Brief” pursuant to N.C.R. App. P. 10.

### III. Grounds for Appellate Review

[2] As the business court’s ruling did not finally dispose of all of the plaintiffs’ claims and defendants’ counterclaims, both plaintiffs’ appeal and defendants’ cross appeal are interlocutory. *See Metcalf v. Palmer*, 46 N.C. App. 622, 624, 265 S.E.2d 484, 485 (1980) (“An order is interlocutory if it does not determine the issues but directs some further proceeding preliminary to final decree.” (citation and quotation marks omitted)).

Generally, there is no right of immediate appeal from an interlocutory order with two exceptions: (1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there is no just reason to delay the appeal,

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or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed.

*FMB, Inc. v. Creech*, — N.C. App. —, —, 679 S.E.2d 410, 412 (2009) (citations and quotation marks omitted). Here, the business court's order stated that “[p]ursuant to authority of Rule 54(b), the court determines that there is no just reason for delay in entering final judgment as to the Claims and Counterclaims resolved[,]” and “except for future determination of the Plaintiffs' Claim Two and Defendants' First, Second, Seventh and Eight Claims stated by Counterclaim, the rulings reflected in this Order are deemed to constitute a final judgment as to all Claims and Counterclaims raised in this civil action.” See N.C. Gen. Stat. § 1A-1, Rule 54(b). Even though we are not bound by the business court's Rule 54 certification, in our discretion we will review the parties' interlocutory appeals, as “there is no just reason for delay” and to avoid piece-meal litigation given the multiple inter-related claims and counterclaims brought forth by the parties. See *Hewett v. Weisser*, — N.C. App. —, —, 689 S.E.2d 408, 409 (2009) (holding that “although this appeal is interlocutory, as the trial court's order did not dispose of all claims, we will review this appeal as the trial court certified the order for appeal and ‘review will avoid piece-meal litigation.’ ”(citation omitted)).

#### IV. Standard of Review

All of plaintiffs' and defendants' assignments of error relate to the business court's ruling on their motions for summary judgment.

Summary judgment is appropriate ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’ N.C. Gen. Stat. § 1A-1, Rule 56(c). ‘A trial court's grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party.’ *Sturgill v. Ashe Memorial Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

*Liptrap v. Coyne*, — N.C. App. —, —, 675 S.E.2d 693, 694 (2009). Plaintiffs' appeal addresses substantive issues related to the business court's ruling regarding the breakup of the PLLC but defendants' cross appeal addresses the issue of standing in addition to their arguments as to the substantive issues. As the issue of standing is

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jurisdictional, *see Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002), we will address standing before turning to the substantive merits of plaintiffs' and defendants' arguments on appeal.

#### V. Standing

[3] Defendants contend that the business court erred in partially denying their motion for summary judgment on the issue of standing and not dismissing all of plaintiffs claims.

This Court has held that

[s]tanding' to sue means simply that the party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. *Sierra Club v. Morton*, 405 U.S. 727, 31 L. Ed. 2d 636 (1972). Standing is a jurisdictional issue[,] . . . [and] does not generally concern the ultimate merits of a lawsuit. *Id.* at 804.

*Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 140, 544 S.E.2d 821, 824 (2001). "A party has standing to initiate a lawsuit if he is a real party in interest." *Slaughter v. Swicegood*, 162 N.C. App. 457, 463, 591 S.E.2d 577, 582 (2004) (citations and quotation marks omitted); N.C. Gen. Stat. § 1A-1, Rule 17(a). "A real party in interest is 'a party who is benefitted or injured by the judgment in the case', [citation omitted] [and] who by substantive law has the legal right to enforce the claim in question." *Carolina First Nat'l Bank v. Douglas Gallery of Homes*, 68 N.C. App. 246, 249, 314 S.E.2d 801, 803 (1984) (citation omitted). Specifically, defendants contend that plaintiffs did not have standing to bring this action in the name of the PLLC, individually, or derivatively.

#### A. Standing to Cause the PLLC to Institute an Action

Defendants contend that, as the majority of the member-managers of the PLLC, they did not authorize nor ratify this suit but have specifically objected to it being brought against them. Defendants claim that without their authorization, plaintiffs did not have authority to cause the PLLC to institute this action. The issue of whether a co-member of an PLLC could cause the PLLC to bring a suit against another co-member was addressed in *Crouse v. Mineo*, 189 N.C. App. 232, 658 S.E.2d 33 (2008).

In *Crouse*, the plaintiff, a 50% member of the PLLC law firm, caused the law firm to bring suit against the defendant, the other 50%

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member of the PLLC law firm. *Id.* at 234, 658 S.E.2d at 35. The trial court dismissed plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). *Id.* at 235, 658 S.E.2d at 35. On appeal, this Court noted that N.C. Gen. Stat. § 57C-3-23 (2007) provides that "An act of a manager that is not apparently for carrying on the usual course of the business of the limited liability company does not bind the limited liability company unless authorized in fact or ratified by the limited liability company." *Id.* at 239, 658 S.E.2d at 38. This Court held that "the filing of an action by one manager of an LLC against a co-manager to recover purported assets of the LLC allegedly misappropriated by that co-manager is a management decision" requiring approval by a majority of the LLC members. *Id.* at 239, 658 S.E.2d at 37-38. In affirming the trial court's dismissal of the claims brought by the firm, this Court further noted that "it is clear that Defendant, as the other member-manager of [the PLLC law firm] . . . did not authorize or ratify the filing of the lawsuit[,] and the plaintiff 'lacked authority to cause [the PLLC law firm] . . . to institute the present action on its own behalf.'" *Id.* at 239, 658 S.E.2d at 38.

We note that the business court concluded that at the time the suit was filed "the Plaintiffs did not constitute a majority of the Members of the Firm and they therefore did not have authority to cause the Firm to bring any Claims in its own behalf." This conclusion is correct; the plaintiffs as minority members of the PLLC did not have authority to cause the PLLC to file the complaint.

Even though it is not addressed by either party on appeal, defendants state in their answer and counterclaims that they brought "this action on their own behalf and on behalf of the Firm." As we review the business court's ruling on partial summary judgment *de novo*, *Liptrap*, — N.C. App. at —, 675 S.E.2d at 694, we also address defendants' standing to cause the PLLC to bring counterclaims against plaintiffs. Here, defendants constituted a majority of members in the PLLC and properly had standing to cause the PLLC to bring counterclaims against plaintiffs.

#### B. Individual Standing

As we have determined that plaintiffs did not have standing to cause the PLLC to file claims against defendants, we next must consider whether plaintiffs had standing to bring individual claims against Defendants. Defendants, citing *Crouse v. Mineo*, argue that plaintiffs as individuals did not have standing to bring claims of unfair and deceptive trade practices and breach of fiduciary duty as these

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claims relate to the parties' relationship with the PLLC. Plaintiffs contend that the business court erred in granting defendants' motion for partial summary judgment on this issue as "*Crouse* does not bar Plaintiffs from bringing this action individually." As stated above, the plaintiff and the defendant in *Crouse* were both members of a law firm organized and operated as a PLLC. 189 N.C. App. at 234, 658 S.E.2d at 35. The plaintiff brought individual claims against the defendant for *quantum meruit* for legal services rendered for the benefit of defendant and for unfair and deceptive trade practices, which were dismissed by the trial court. *Id.* at 245-46, 658 S.E.2d at 41. On appeal, this Court noted that N.C. Gen. Stat. § 57C-3-30(b), states that a member of a LLC "is not a proper party to proceedings by or against a limited liability company, except where the object of the proceeding is to enforce a member's right against or liability" to the LLC. *Id.* at 245, 658 S.E.2d at 41. This Court held that N.C. Gen. Stat. § 57C-3-30(b) was inapplicable to the plaintiff's individual claim for *quantum meruit*. *Id.* This Court, in reversing dismissal of the plaintiff's claim for *quantum meruit*, explained that "[w]hile [the plaintiff] would not be a proper party to a proceeding by [the PLLC law firm], the *quantum meruit* claim was brought to recover for injuries caused to [the plaintiff] individually." *Id.* As to the plaintiff's unfair and deceptive trade practices claim, this Court noted that the plaintiff alleged that this claim was based on "Defendant's breach of fiduciary duty and anticipatory breaches of fiduciary duty" and "Defendant had a 'special relationship of trust and confidence that constituted a fiduciary relationship[]' by virtue of 'their partnership, co-membership in [the PLLC law firm] and otherwise[.]'" *Id.* at 247, 658 S.E.2d at 42. This Court concluded that the plaintiff did not state an individual claim for unfair and deceptive trade practices because the allegation of breach of fiduciary duty and unfair and deceptive trade practices claims "relate[d] to the parties' relationship" through the PLLC law firm and affirmed the trial courts' dismissal of this claim. *Id.* at 247, 658 S.E.2d at 42.

Therefore, *Crouse* establishes that individual claims may be brought by a plaintiff-member of a PLLC against a defendant-member of that PLLC if the injuries alleged were caused to the plaintiff individually by that defendant, but individual claims may not be brought by a plaintiff-member against a defendant-member of an PLLC if those injuries alleged are based on duties that arise as part of the PLLC. *See id.* at 245, 247, 658 S.E.2d at 41, 42. Like the plaintiff in *Crouse*, plaintiffs here based their individual claims for an accounting to the PLLC (claim one), demand of liquidating distribution (claim

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three), constructive fraud/breach of fiduciary duty (claim four), and unfair and deceptive trade practices (claim five) on defendants' breach of fiduciary duties to the PLLC as defendants had "assum[ed] responsibility for winding up the affairs of the Company[.]" As these individual claims by plaintiffs are based on the breach of fiduciary duties "relate[d] to the parties' relationship[.]" as part of the PLLC, *see id.* at 246-47, 658 S.E.2d at 42, we affirm the business court's order granting defendants' partial summary judgment motion and dismissing these individual claims by plaintiffs for lack of standing. Plaintiffs' individual claim for an accounting to plaintiffs (claim two) does not state that it is based on a breach of a fiduciary duty but on defendants' duties to account for the PLLC's "profits or benefit derived in connection with the winding up of the affairs of the Company." As this duty is also "relate[d] to the parties' relationship" as part of the PLLC, *see id.* at 246-47, 658 S.E.2d at 42, it is not a proper individual claim pursuant to *Crouse*. Therefore, we reverse the business court's denial of defendants' motion for summary judgment for plaintiffs' individual claim for an accounting to plaintiffs (claim two) and thereby, dismiss all of plaintiffs' individual claims.

Additionally, we note that based on its order granting partial summary judgment, the business court did not address defendant's individual standing to bring their counterclaims but held that defendants' counterclaims for breach of fiduciary duty (claim three), conversion/misappropriation of PLLC assets (claim four), unjust enrichment (claim five), constructive trust, equitable lien, and/or resulting trust (claim six), breach of fiduciary duty/*ultra vires* act (claim nine), and demand for statutory distribution of assets (claim ten) were rendered moot by its decision. As stated above, defendants' answer stated that they brought their counterclaims "on their own behalf and on behalf of the Firm." However, defendants' individual counterclaims three, four, five, six, and nine are based on the assertion that plaintiffs "still owe a fiduciary duty to the Firm." Accordingly, we reverse the business court's ruling that defendants' individual counterclaims three, four, five, six, and nine were moot; instead the business court should have dismissed these counterclaims because they were "relate[d] to the parties' relationship" in the PLLC. *See id.* at 246-47, 658 S.E.2d at 42.

### C. Derivative Standing on Behalf of the PLLC

Defendants also contend that the business court erred in holding that plaintiffs had standing to bring a derivative action on behalf of

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the PLLC. N.C. Gen. Stat. § 57C-8-01(a)-(b) (2007) provides the requirements for a member of a LLC to bring a derivative suit:

(a) A member may bring an action in the superior court of this State in the right of any domestic or foreign limited liability company to recover a judgment in its favor if the following conditions are met:

(1) The plaintiff does not have the authority to cause the limited liability company to sue in its own right; and

(2) The plaintiff (i) is a member of the limited liability company at the time of bringing the action, and (ii) was a member of the limited liability company at the time of the transaction of which the plaintiff complains, or the plaintiff's status as a member of the limited liability company thereafter devolved upon the plaintiff pursuant to the terms of the operating agreement from a person who was a member at such time.

(b) The complaint shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the managers, directors, or other applicable authority and the reasons for the plaintiff's failure to obtain the action, or for not making the effort.

Defendants argue that at the time plaintiffs filed their derivative claims, they had already withdrawn from the PLLC and were not "members" of the PLLC and did not have standing to file a derivative suit. As defendants point out, N.C. Gen. Stat. § 57C-5-06 (2007), states that a member of a LLC "may withdraw only at the time or upon the happening of the events specified in the articles of organization or a written operating agreement." Defendants argue that plaintiffs withdrew pursuant to a written operation agreement or by application of the doctrine of equitable estoppel. Therefore, we must consider whether the plaintiffs were still "members" of the PLLC when they filed the complaint. If they were members, they had standing to bring derivative claims on behalf of the PLLC; if not, they did not have standing.

### 1. Withdrawal by Written Operating Agreement

N.C. Gen. Stat. § 57C-5-06 (2007) addresses voluntary withdrawal from an LLC: "A member may withdraw only at the time or upon the happening of the events specified in the articles of organization or a written operating agreement." N.C. Gen. Stat. § 57C-1-03(16) (2007) defines "operating agreement" as follows:

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Any agreement, written or oral, of the members with respect to the affairs of a limited liability company and the conduct of its business that is binding on all the members. An operating agreement shall include, in the case of a limited liability company with only one member, any writing signed by the member, without regard to whether the writing constitutes an agreement, that relates to the affairs of the limited liability company and the conduct of its business.

N.C. Gen. Stat. § 57C-3-05 (2007) sets forth the circumstances under which a member is bound by the terms of an operating agreement:

A member shall be bound by any operating agreement, including any amendment thereto, otherwise valid under this Chapter and other applicable law, (i) to which the member has expressly assented, or (ii) which was in effect at the time the member became a member and either was in writing or the terms of which were actually known to the member, or (iii) with respect to any amendment, if the member was bound by the operating agreement as in effect immediately prior to such amendment and such amendment was adopted in accordance with the terms of such operating agreement. The articles of organization or written operating agreement may require that all agreements of the members constituting the operating agreement be in writing, in which case the term “operating agreement” shall not include oral agreements of the members. Except to the extent otherwise provided in a written operating agreement, a limited liability company shall be deemed for all purposes to be a party to the operating agreement of its member or members.

Here, the articles of organization apparently did not address withdrawal; the articles are not in our record and no party has argued that the articles control this issue. It is also undisputed that the PLLC did not have a formal written “operating agreement.” Defendants contend that this Court should liberally construe N.C. Gen. Stat. § 57C-5-06 to hold that the writings and oral representations made by and between plaintiffs and defendants amounted to an “operating agreement” which governs the terms of their withdrawal. Defendants claim that the following documents in the aggregate form an operating agreement to withdraw and consent to withdraw from the PLLC by plaintiffs: (1) plaintiff Adams’ email to the PLLC members stating that he was leaving the PLLC; (2) plaintiff Boughman’s letter terminating his COBRA benefits; (3) plaintiff Burge’s client letters stating plaintiffs

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had “withdrawn[;]” (4) plaintiffs’ new articles of incorporation creating a new firm, contracts in association with vendors to service the new firm, and the application to the State Bar for permission to form a LLC; (5) plaintiff Boughman’s letter to BB&T; and (6) defendant Brewer’s memorandum which established specific terms for withdrawal.

After careful review, we hold that the documents put forward by defendants do not rise to the level of a binding agreement on the members of the PLLC. Although N.C. Gen. Stat. § 57C-1-03(16) does permit an operating agreement to be oral or written, both N.C. Gen. Stat. §§ 57C-1-03 and 57C-3-05 require that each member agree to the terms of the operating agreement. N.C. Gen. Stat. § 57C-3-05 provides that a member is bound by an operating agreement only if “the member has expressly assented” to it.<sup>2</sup> But in this situation, the various documents demonstrate the parties’ disagreement as to how to handle the breakup of the PLLC; they certainly do not demonstrate that any plaintiff “expressly assented” to any terms proposed by defendants, including the Brewer memo. Although plaintiff Adam’s 14 June 2008 email does state that he is leaving the PLLC, it also states that as a result he expects to receive his “share of revenue and compensation” equal to his percentage of ownership interest, including revenues “from this day forward.” Contrary to defendants’ contentions, this language is not similar to the process for distribution of a member’s assets upon withdrawal pursuant to N.C. Gen. Stat. § 57C-5-07 (2007) (any withdrawing member is entitled to “the fair value of the member’s interest in the limited liability company as of the date of withdrawal . . .”), as plaintiff Adam is demanding a share of future revenues. Plaintiff Boughman’s COBRA Insurance letter merely states that he is cancelling his COBRA health insurance coverage for his family through the plan offered by the PLLC because he has another health insurance provider. Plaintiff Boughman makes no mention of anything that could be construed as allowing for a withdrawal from the PLLC. We also note that plaintiff Boughman would also have had to cancel his medical insurance through the PLLC upon ceasing to work there, regardless of the circumstances of his leaving the PLLC. Plaintiff Burge’s client letter is not included in the record on appeal and thus we cannot consider it. Plaintiffs’ articles of organization creating a new firm, the related contracts from vendors,

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2. The provisions of N.C. Gen. Stat. § 57C-3-05 as to an operating agreement “(ii) which was in effect at the time the member became a member and either was in writing or the terms of which were actually known to the member” and “(iii) with respect to an amendment” are not implicated here.

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and plaintiffs' application to the State Bar to form a LLC do not mention any operating agreement of the PLLC or make any representations regarding plaintiffs' position on the breakup of the PLLC. Plaintiffs would have had to start a new firm to continue representing their clients whether they had withdrawn from the PLLC or if the PLLC was going through a dissolution. Plaintiff Boughman's letter to BB&T merely asks if defendants had paid off the PLLC's debts and informs the bank that they did not consent to any further loans. In fact, plaintiff Boughman states that the PLLC went through a "dissolution on July 12, 2005." Finally, the Brewer memo does address plaintiffs' "withdrawal" from the PLLC but also states that "the remaining members of the firm are effectuating a winding up of the operation of the law firm[.]" *See* N.C. Gen. Stat. § 57C-5-04 ("the managers shall wind up the limited liability company's affairs following its dissolution . . ."). However, defendant Brewer testified in his deposition that in his memorandum he used these terms in a "nontechnical sense." Also, we see no indication that the plaintiffs "expressly assented" to the Brewer memo's terms as they never discussed it with any defendant and plaintiffs did not cash the checks tendered to them with the Brewer memo. *See Zanone v. RJR Nabisco*, 120 N.C. App. 768, 773, 463 S.E.2d 584, 588 (1995) ("the law clearly states, the cashing of a check tendered in full payment of a disputed claim establishes an accord and satisfaction as a matter of law. . . . The claim is extinguished, regardless of any disclaimers which may be communicated by the payee." (citation, brackets, and quotation marks omitted)). Defendant Brewer, in his deposition, even suggested that he understood that plaintiffs did not agree to the terms of the Brewer memo as he explained that the reason he had not sent plaintiffs their shares of the expenses paid from the disputed contingency fee cases that had been collected was because plaintiffs had not cashed the checks tendered pursuant to the Brewer memo. Therefore, it is not clear in these documents whether the parties are referring to a "withdrawal" or a "dissolution." In the aggregate, these writings fall significantly short of establishing a "written operating agreement" allowing for a withdrawal, *see* N.C. Gen. Stat. § 57C-5-06, nor is there any indication that the plaintiffs "expressly assented" to the terms as proposed by Defendants *See* N.C. Gen. Stat. § 57C-3-05. The PLLC had no operating agreement, so plaintiffs could not have withdrawn pursuant to N.C. Gen. Stat. § 57C-5-06. Accordingly, defendants' argument is without merit.

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**2. Withdrawal by Estoppel**

Defendants contend in the alternative that plaintiffs are estopped from claiming that they did not withdraw from the PLLC. Defendants further argue that this “withdrawal by estoppel” occurred before plaintiffs filed their derivative claims. Therefore, defendants claim that plaintiffs were not members of the PLLC at the time they filed suit and did not have standing to file a derivative claim on behalf of the PLLC. However, defendants’ second motion for summary judgment addressing plaintiffs’ standing makes no argument regarding the doctrine of equitable estoppel. The business court’s judgment also makes no mention of estoppel in its ruling on plaintiffs’ standing. “It is a long-standing rule that a party in a civil case may not raise an issue on appeal that was not raised at the trial level.” *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 690, 562 S.E.2d 82, 95 (2002); N.C.R. App. P. 10(b)(1). As defendants failed to raise the issue of equitable estoppel in its motion addressing standing, we will not consider this argument for the first time on appeal. Defendant’s argument is overruled.

Accordingly, we hold that for the purpose of standing, plaintiffs were members of the PLLC at the time of filing their complaint. As to the other requirements in N.C. Gen. Stat. § 57C-8-01 for members of a LLC to bring a derivative action, it appears that plaintiffs had a minority ownership interest in the PLLC and could not cause the PLLC to sue in its own right. As to the particularized efforts alleged by plaintiffs to “obtain the action the plaintiff desires[,]” the complaint states that

19. Defendants by check purported to make a final distribution to Plaintiffs. Plaintiffs did not accept this distribution, as evidenced by their refusal to negotiate the checks, and their oral notices to Defendants. Plaintiffs also made written demand upon the Defendants for an accounting of the Company assets and of the profits thereof since December 31, 2004, the date of the last accounting for Company profits and losses, and to pay over to the Plaintiffs their final Company distribution as provided for under N.C.G.S. § 57C-6-05 . . . .

20. Defendants failed and refused to render such an accounting and/or pay over such final distribution to the Plaintiffs.”

*See* N.C. Gen. Stat. § 57C-8-01. Therefore, plaintiffs had standing to bring their derivative claims against Defendants. Accordingly, we affirm the business court’s denial of defendant’s motion for partial

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summary judgment as to plaintiffs' standing to bring their derivative claims on behalf of the PLLC.

In summary, we hold that plaintiffs had standing to bring their derivative claims, but not their individual claims; defendants had standing to bring their counterclaims on behalf of the PLLC, but not their individual counterclaims. Therefore, we affirm and reverse the business court's summary judgment rulings on standing accordingly.

#### VI. Plaintiffs' and Defendants' Substantive Claims

**[4]** Moving to the substantive issues, plaintiffs first contend that the business court committed reversible error in affirmatively applying equitable estoppel to sustain defendants' counterclaim for declaration of withdrawal and refusing to apply the provisions of the Limited Liability Company Act to resolve the deadlock among the members of the PLLC. Defendants contend that the business court did not err in its application of the doctrine of equitable estoppel as North Carolina law "does not mandate a finding of dissolution or an order for winding up."

##### A. The Doctrine of Equitable Estoppel

The business court, in partially granting defendants' second counterclaim, declared that under principles of equitable estoppel plaintiffs were estopped from denying that they withdrew from the PLLC as of 30 June 2005. N.C. Gen. Stat. § 57C-10-05 (2007) provides that "[i]n any case not provided for in this Chapter, the rules of law and equity shall govern." N.C. Gen. Stat. § 57C-10-03(b) also provides that "[t]he law of estoppel shall apply under this Chapter[.]". Accordingly, the business court stated in its findings that "[a]fter due consideration, the court concludes that the Breakup Facts present a situation not consistent with the spirit or letter of the Act, and therefore not provided for in the [Limited Liability Company Act,]" and went on to apply the doctrine of equitable estoppel to declare that plaintiffs could not deny they withdrew from the PLLC.<sup>3</sup> However, our Courts have consistently held that

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3. We note that in contrast to the business court's 31 March 2008 "Opinion and Order[,] stating that no legal remedy was appropriate in these circumstances, the business court in denying plaintiffs' 4 March 2008 motion for preliminary injunction to enjoin defendants from disbursing future contingent fees and cost reimbursement received from the disputed contingent fee cases concluded that this ruling was in part based on the conclusion that plaintiffs' "claims for money damages [were] adequately provided for at law," and noted that, "Ordinarily, an injunction will not be granted where there is a full, adequate and complete remedy at law, which is as practical and efficient as is the equitable remedy.

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‘[e]quity will not lend its aid in any case whe[n] the party seeking it has a full and complete remedy at law.’ *Centre Development Co. v. County of Wilson*, 44 N.C. App. 469, 470, 261 S.E.2d 275, 276, *review denied, appeal dismissed*, 299 N.C. 735, 267 S.E.2d 660 (1980) (citation omitted) (plaintiff could not use an injunction to prevent the county’s use of eminent domain when plaintiff had a statutory remedy); *Hawks v. Brindle*, 51 N.C. App. 19, 25, 275 S.E.2d 277, 282 (1981) (plaintiff could not use an equitable restitution claim when plaintiff had a legal remedy for breach of the covenant against encumbrances); *see also Johnson v. Stevenson*, 269 N.C. 200, 152 S.E.2d 214 (1967) (plaintiff cannot invoke a constructive trust on property disposed of by will when a direct attack by will caveat ‘gave her a full and complete remedy at law’); *Jefferson Standard Life Ins. Co. v. Guilford County*, 225 N.C. 293, 34 S.E.2d 430 (1945) (plaintiff could not use a restitution theory for recovering the balance of a promissory note secured by a deed of trust when plaintiff had the legal remedy of foreclosure).

*Jones Cooling & Heating, Inc. v. Booth*, 99 N.C. App. 757, 759-60, 394 S.E.2d 292, 294 (1990), *disc. review denied*, 328 N.C. 732, 404 S.E.2d 869 (1991). Plaintiffs contend that there was a legal remedy applicable—the North Carolina Limited Liability Company Act—which allows for judicial dissolution of a limited liability company in a proceeding by a member because of deadlock or misapplication of company assets, and the business court’s application of equity was in error. Therefore, we must first determine if there was “a full and complete remedy at law” under the Limited Liability Company Act. *See id.*

#### B. Withdrawal

We first determine whether plaintiffs withdrew as a matter of law. N.C. Gen. Stat. § 57C-3-02 (2007), states that “[a] person ceases to be a member of a limited liability company upon the happening of any of the following events of withdrawal: (1) The person’s voluntary withdrawal from the limited liability company as provided in G.S. 57C-5-06[.]”<sup>4</sup>

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4. Other “events of withdrawal” include (2) removal pursuant to the articles of organization or an operating agreement; (3) assignment to creditors, voluntary petition in bankruptcy, adjudication of bankruptcy or insolvency, filing a petition seeking “reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation[,]” the appointment of trustee or receiver for that person’s properties, and filing answer or other pleadings admitting or failing to contest an allegation of withdrawal; (4) continuation of a proceeding against person seeking reorganization, etc. (5) a death or adjudication of incompetent; (6) termination

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As stated above, for voluntary withdrawal N.C. Gen. Stat. § 57C-5-06, states that a member of an LLC “may withdraw only at the time or upon the happening of the events specified in the articles of organization or a written operating agreement.” The record on appeal does not contain the articles of organization for the PLLC and, as we determined above, there was no written operating agreement providing for withdrawal of a PLLC member. Therefore, withdrawal pursuant to N.C. Gen. Stat. § 57C-5-06 was not available as a remedy at law for the parties. Accordingly, we affirm the business court’s order granting plaintiffs’ motion for partial summary judgment and dismissing defendants’ first counterclaim requesting a declaratory judgment that individual plaintiffs withdrew from the PLLC pursuant to N.C. Gen. Stat. § 57C-5-06.

#### C. Judicial Dissolution

Turning next to plaintiffs’ argument as to whether judicial dissolution was applicable, N.C. Gen. Stat. § 57C-6-02 (2007) states that “[t]he superior court may dissolve a limited liability company in a proceeding by a member of that LLC

if it is established that (i) the managers, directors, or any other persons in control of the limited liability company are deadlocked in the management of the affairs of the limited liability company, the members are unable to break the deadlock, and irreparable injury to the limited liability company is threatened or being suffered, or the business and affairs of the limited liability company can no longer be conducted to the advantage of the members generally, because of the deadlock; (ii) liquidation is reasonably necessary for the protection of the rights or interests of the complaining member, (iii) the assets of the limited liability company are being misapplied or wasted; or (iv) the articles of organization or a written operating agreement entitles the complaining member to dissolution of the limited liability company[.]

Here, since 14 June 2005, there has been a deadlock between the PLLC members as a result of their disagreement regarding division of profits derived from pending contingent fee cases when three members

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of the trust when a member is acting as a trustee; (7) dissolution and commencement of winding up of the LLC; (8) dissolution or revocation of the LLC’s charter; and (9) distribution by the fiduciary of an estate’s entire interest in the LLC. N.C. Gen. Stat. § 57C-3-02. As the contention by defendants is that plaintiffs voluntarily withdrew when they left the PLLC in June 2005, the other grounds for withdrawal enumerated in N.C. Gen. Stat. § 57C-3-02 are inapplicable.

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of the PLLC left the PLLC, and plaintiffs and defendants began practicing separate and apart beginning on 1 July 2005. Although there were communications between plaintiffs and defendants addressing the assets of the PLLC, none resolved this deadlock. Because the three plaintiffs were no longer willing to practice with defendants, the PLLC could “no longer be conducted to the advantage of the members generally[.]” *See id.* Liquidation of the PLLC’s assets “is reasonably necessary for the protection of the rights or interests of the complaining member” as the PLLC’s members have been unable to reach any agreement regarding profits from the disputed pending contingent fee cases. *See id.* Also, there is evidence that profits made by defendants since the deadlock from one of the disputed contingent fee cases were not distributed to the members or accounted for by Defendants. Therefore, there is a potential that the PLLC’s assets are being misapplied. Accordingly, plaintiffs have forecast facts which would permit judicial dissolution pursuant to N.C. Gen. Stat. § 57C-6-02. As defendants had “a full and complete remedy at law[,]” the business court erred in not applying this legal remedy and instead applying the principles of equity to resolve the issues arising from this breakup. *See Jones*, 99 N.C. App. at 759-60, 394 S.E.2d at 294.

Defendants contend that “[j]udicial dissolution is a remedy left to the discretion of the trial court, even if a party were to establish” the elements for dissolution listed in N.C. Gen. Stat. § 57C-6-02. Defendants contend that it was within the business court’s discretion not to declare a judicial dissolution as “the undisputed facts in this case permit a single inference: that the doctrine of quasi-estoppel bars Plaintiffs claims.” In support of this argument defendants again cite *Crouse v. Mineo*, 189 N.C. App. 232, 658 S.E.2d 33 (2008).

In *Crouse*, the plaintiff contended that the “trial court erred by denying their motion to appoint [the plaintiff] to wind up the affairs of [the PLLC law firm].” 189 N.C. App. at 247, 658 S.E.2d at 42. This Court noted that

[the plaintiff] petitioned the trial court for the appointment of a person to wind up the affairs of [the PLLC law firm]. N.C.G.S. § 57C-6-04(a) further provides as follows: ‘The court *may* wind up the limited liability company’s affairs, or appoint a person to wind up its affairs, on application of any member, his legal representative, or assignee.’ *Id.* (emphasis added). The use of the term ‘*may*’ connotes discretion on the part of the trial court to wind up

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the affairs itself, appoint a person to do so, or do neither. *See Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. [245], 250, 652 S.E.2d 713, 717 (2007) (recognizing that ‘[t]he use of the word ‘may’ has been interpreted by our Supreme Court to connote discretionary power, rather than an obligatory one’); *Campbell v. Church*, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979) (stating that ‘the use of ‘may’ generally connotes permissive or discretionary action and does not mandate or compel a particular act.’).

*Id.* at 247-48, 658 S.E.2d at 42. This Court went on to hold that the trial court did not abuse its discretion in not appointing plaintiff to wind up the PLLC because the plaintiff’s complaint had been dismissed in its entirety, and the “unique circumstances existing at the time the trial court denied the motion[.]” *Id.* at 248, 658 S.E.2d at 42-43. This case is unlike *Crouse* as the complaint and counterclaims have not been dismissed in their entirety. Also, in *Crouse*, the “unique circumstances” were not specifically identified by the Court, *See id.* at 235, 658 S.E.2d at 35 and defendants make no argument that “unique circumstances” also exist here which would justify application of the same rule.

We agree with defendants that N.C. Gen. Stat. § 57C-6-02 states that the trial court “may” issue a judicial dissolution, and the issuance of such an order of dissolution is within the trial court’s discretion. *See id.* at 247-48, 658 S.E.2d at 42. However, the terms of N.C. Gen. Stat. § 57C-6-02 directly address the situation presented here, where judicial dissolution is the only available legal remedy to resolve the PLLC’s disputes. We have determined that the business court erred to the extent that it used equitable estoppel to create an “operating agreement” governing withdrawal even after the deadlock between the members of the PLLC had arisen, and the only reason the business court did not issue judicial dissolution was its determination that equitable estoppel was instead the proper basis for resolution of this case. Therefore, because the business court improperly applied equitable estoppel in this situation, it abused its discretion by not ordering judicial dissolution of the PLLC.

On appeal defendants also bring forth the argument that the business court erred in denying their motion for summary judgment because plaintiffs were estopped from denying withdrawal on any terms other than those expressed in the Brewer memorandum. However, as we have ruled that the business court erred in its application of the doctrine of equitable estoppel, this argument is overruled.

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**VII. Conclusion**

Accordingly, we reverse the business court's judgment granting partial summary judgment in favor of defendants on the basis of equitable estoppel and remand to the business court for granting of summary judgment in favor of plaintiffs on the issue of judicial dissolution pursuant N.C. Gen. Stat. § 57C-6-02, for a decree of dissolution, and directing the winding up of the PLLC pursuant to N.C. Gen. Stat. § 57C-6-02.3 (2007). Given this ruling, plaintiffs' derivative claims for an accounting to the PLLC (claim one), an accounting to plaintiffs (claim two), and a demand of liquidating distribution (claim three), as well as defendants' counterclaim for a demand for statutory distribution of assets (counterclaim ten), will be addressed by the business court in its directing the winding up of the PLLC. As plaintiffs are deemed not to have withdrawn "from the Firm as of June 30, 2005[,]” this creates a genuine issue of material fact as to plaintiffs' remaining derivative claims and defendants' counterclaims brought on behalf of the PLLC. *See Liptrap*, — N.C. App. at —, 675 S.E.2d at 694. Accordingly, we reverse the business court's granting of defendants' motion for summary judgment dismissing plaintiffs' derivative claims for constructive fraud/breach of fiduciary duty (claim four) and unfair and deceptive trade practices (claim five) and remand for further proceedings on these claims. We also reverse the business court's ruling that defendants' counterclaims on behalf of the PLLC for breach of fiduciary duty (counterclaim three), conversion/misappropriation of PLLC assets (counterclaim four), unjust enrichment (counterclaim five), constructive trust, equitable lien, and/or resulting trust (counterclaim six), and breach of fiduciary duty/*ultra vires* act (counterclaim nine) were moot, and remand for future proceedings. As the business court made no ruling regarding defendants' for breach of fiduciary duty (counterclaim seven) and unjust enrichment (counterclaim eight), these claims would also go forward.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges GEER and ELMORE concur.

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REBECCA KENNEDY AND CHARLES L. KENNEDY, Co-ADMINISTRATORS OF THE ESTATE OF EMILY ELIZABETH MAY, PLAINTIFFS-APPELLANTS V. DANIELLE POLUMBO, BRANDI REAVES, CAROLINA HOSPITALITY OF FLORIDA, INC. d/b/a CAROLINA HOSPITALITY, INC., FAYETTEVILLE MIYABI, INC., ACS STATE & LOCAL SOLUTIONS, INC., AND THE CITY OF FAYETTEVILLE, NORTH CAROLINA, DEFENDANTS

No. COA10-389  
No. COA10-586

(Filed 1 February 2011)

**1. Appeal and Error— Rules violations—transcript—not jurisdictional or substantial**

The Rules of Appellate Procedure which deal with the time and manner for ordering, preparation, and delivery of the transcript (Rules 7(a)(1) and 7(b)(2)) are not jurisdictional and violations that were not substantial or gross did not result in sanctions.

**2. Appeal and Error— interlocutory orders and appeals—partial summary judgments—common defenses—substantial right**

Appeals from summary judgments for some but not all of the parties were from interlocutory orders, but were not dismissed because there were common factual defenses, raising the possibility of inconsistent verdicts. Determination of the underlying substantive appeal promoted finality rather than fragmentation.

**3. Negligence— car striking utility pole—duty of City—proximate cause**

The trial court properly granted summary judgment for defendant City in a negligence claim that arose from a single car accident in which plaintiffs' decedent was killed when the car in which she was a passenger struck a utility pole on a highway and a red-light camera fell onto and collapsed the car roof. The City did not have an affirmative or contractual duty to plaintiffs to maintain the highway in a safe condition for decedent, and the intervening negligence of the driver was the proximate cause of decedent's injuries.

**4. Negligence— contributory—riding with impaired driver**

The trial court properly granted summary judgment for the City and the owner and operator of a red-light camera where plaintiffs' decedent was killed in an automobile accident when the car in which she was a passenger struck a utility pole and a

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red-light camera collapsed the roof of the car directly above decedent. The deceased was contributorily negligent in voluntarily riding with an appreciably impaired driver.

Appeal by plaintiffs from judgments entered 18 November 2009 and 23 November 2009 by Judge Jack A. Thompson in Cumberland County Superior Court. Heard in the Court of Appeals 1 November 2010.

*James A. Davis & Associate, PLLC, by James A. David and Christopher D. Lane, for plaintiffs-appellants.*

*Robinson & Lawing, L.L.P., by Robert J. Lawing and H. Brent Helms, for defendant-appellee ACS State & Local Solutions.*

*The Charleston Group, by R. Jonathan Charleston and Jose A. Coker, and Graebe Hanna & Welborn, PLLC, by Mark R. Sigmon, for defendant-appellee City of Fayetteville.*

MARTIN, Chief Judge.

Plaintiffs are the co-administrators of the Estate of Emily Elizabeth May, who died tragically during the early morning hours of 17 May 2007 as a result of injuries sustained when the automobile in which she was a passenger struck a utility pole. Plaintiffs filed suit alleging that Ms. May's death was proximately caused by separate acts of negligence on the part of Danielle Polumbo, the driver of the automobile; Carolina Hospitality of Florida, Inc., d/b/a Carolina Hospitality, Inc. ("Carolina Hospitality"), the operator of a nightclub where Ms. Polumbo and Ms. May had been patrons prior to the accident; Brandi Reaves, a bartender at that establishment; ACS State and Local Solutions, Inc. ("ACS"), the owner and operator of a red-light camera which was mounted on the utility pole and fell onto the automobile as a result of the collision; and the City of Fayetteville ("the City"). Only the plaintiffs' claims against ACS and the City are at issue in this appeal.

Both ACS and the City filed responsive pleadings denying, respectively, any negligence on their part and asserting affirmative defenses including, *inter alia*, the decedent's contributory negligence, the insulating negligence of other defendants, and the intervening negligence of other defendants. The City also asserted immunity. Both ACS and the City moved for summary judgment.

The materials before the trial court upon its hearing the motions for summary judgment tended, in summary, to show that Emily

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Elizabeth May and Danielle Polumbo were close friends and spent the evening of 16 May 2007 together in Fayetteville, having dinner at Miyabi's Japanese restaurant and then finishing their evening at Secrets Cabaret ("Secrets"), which is operated by Carolina Hospitality. Both Ms. May and Ms. Polumbo had been drinking alcohol throughout the evening.

Ms. May and Ms. Polumbo left Secrets sometime around 1:00 a.m. on 17 May 2007. Ms. Polumbo drove, and Ms. May rode in the front passenger seat of Ms. Polumbo's Ford Mustang. Within a few minutes after leaving the parking lot of Secrets, Ms. Polumbo was driving northbound on N.C. Highway 24, Bragg Boulevard, at Shannon Drive when she attempted to make a left-hand turn onto Sycamore Dairy Road. Unfortunately, Ms. Polumbo misjudged the turn, drove her car into the concrete median, and collided with a utility pole. A red-light camera was mounted on the utility pole and, upon impact, fell onto the roof of the Ford Mustang directly above Ms. May, who was struck by the collapsing roof.

At approximately 1:23 a.m., Officer W.D. Watson of the Fayetteville Police Department arrived at the scene and observed that Ms. Polumbo smelled strongly of alcohol, her speech was slurred, and she was unsteady on her feet. Ms. Polumbo was arrested and transported to the Cumberland County Jail. At the jail, Ms. Polumbo had problems balancing and following directions during a field sobriety test. Ms. Polumbo also took two breathalyzer tests at the jail and registered alcohol concentrations of .18 and .17, more than twice the legally permitted alcohol concentration. *See* N.C. Gen. Stat. §20-138.1 (2009) (defining the offense of impaired driving as driving a vehicle upon a public roadway with an alcohol concentration of .08 or more). Meanwhile, Ms. May was taken to Cape Fear Medical Center where, unfortunately, she died as a result of her injuries. Ms. Polumbo subsequently pled guilty to felony death by motor vehicle, reckless driving to endanger, driving after consuming alcohol while under the age of 21, and driving while impaired.

The trial court granted summary judgment in favor of ACS by judgment dated 18 November 2009, and in favor of the City of Fayetteville by judgment dated 23 November 2009. Plaintiffs appeal from both judgments; their appeals have been consolidated by order of this Court entered 18 August 2010.

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## I.

**[1]** Defendants have moved to dismiss these appeals as (1) violating Rules 7(a)(1) and 7(b)(2) of the Rules of Appellate Procedure and (2) as interlocutory. With respect to defendants' contentions that plaintiffs' alleged violations of the Rules of Appellate Procedure mandate dismissal of their appeals, we note that "noncompliance with the appellate rules does not, *ipso facto*, mandate dismissal of an appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 194, 657 S.E.2d 361, 363, *on remand*, 192 N.C. App. 114, 665 S.E.2d 493 (2008), *disc. review denied*, 363 N.C. 580, 681 S.E.2d 783 (2009). "Whether and how a court may excuse noncompliance with the rules depends on the nature of the default." *Id.* Notably, "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Id.* at 198, 657 S.E.2d at 365. Neither Rule 7(a)(1) nor Rule 7 (b)(2), which deal with the time and manner for ordering, preparation, and delivery of the transcript of the proceedings, are jurisdictional rule requirements. We will "not consider sanctions of any sort when a party's noncompliance with nonjurisdictional requirements of the rules does not rise to the level of a 'substantial failure' or 'gross violation.'" *Id.* at 199, 657 S.E.2d at 366. "In such instances, the appellate court should simply perform its core function of reviewing the merits of the appeal to the extent possible." *Id.*

**[2]** With respect to the second ground for defendants' motion to dismiss the appeal, we agree that plaintiffs' appeals are from interlocutory orders, as their claims against the remaining defendants are still pending. *See Myers v. Barringer*, 101 N.C. App. 168, 172, 398 S.E.2d 615, 617 (1995) ("Summary judgment granted to some but not all defendants is an interlocutory judgment."). However, we may consider an immediate appeal from an interlocutory order if the order affects a substantial right of the appealing party. *In re Estate of Redding v. Welborn*, 170 N.C. App. 324, 328, 612 S.E.2d 664, 668 (2005). "A substantial right is affected when '(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.'" *Id.* (citing *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 735-36, 460 S.E.2d 332, 335 (1995)).

In the present case, the order granting summary judgment to ACS and the City terminates plaintiffs' action as to those Defendants. However, plaintiffs' claims against the remaining defendants, including

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Ms. Polumbo, Ms. Reaves, and Carolina Hospitality, are still pending and some of the same factual defenses, including the contributory negligence of Ms. May, would apply to those defendants as apply to the present Defendants. Thus, there is the possibility of inconsistent verdicts should we dismiss the present appeals and require plaintiffs to proceed to a final judgment against all defendants before considering their appeals from ACS and the City's granted summary judgment motions. *See Estate of Harvey v. Kore-Kut, Inc.*, 180 N.C. App. 195, 198-99, 636 S.E.2d 210, 212 (2006). Under these circumstances, a determination of the underlying substantive appeal will, in our view, promote finality rather than fragmentation. We conclude that the appeals are, therefore, properly before us and deny the motions to dismiss.

## II.

[3] Turning to the merits of the appeal from the order granting summary judgment in favor of the City, plaintiffs argue that the trial court committed reversible error because there are genuine issues of material fact which preclude judgment as a matter of law. The standard of review of a trial court's order granting summary judgment is *de novo*. *E.g., Nationwide Mut. Fire Ins. Co. v. Mnatsakanov*, 191 N.C. App. 802, 805, 664 S.E.2d 13, 15 (2008). "The purpose of summary judgment is to eliminate formal trial when the only questions involved are questions of law." *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987). "A motion for summary judgment tests the legal sufficiency of a claim for submission to the jury. If the pleadings, depositions, interrogatories, . . . admissions on file, [and affidavits] demonstrate that there is no genuine issue of any material fact and only questions of law exist, then summary judgment is proper." *Bolick v. Townsend Co.*, 94 N.C. App. 650, 652, 381 S.E.2d 175, 176, *disc. review denied*, 325 N.C. 545, 385 S.E.2d 495 (1989). Therefore, we must determine whether the pleadings, depositions, interrogatories and admissions on file, establish that summary judgment was warranted in this case.

The burden is on the movants to show the lack of any issue of fact. *Taylor v. Coats*, 180 N.C. App. 210, 212, 636 S.E.2d 581, 583 (2006). The moving parties, here the City and ACS, may meet this burden by proving that a necessary element of the plaintiffs' claim cannot be met or by proving that the plaintiffs cannot overcome an affirmative defense to bar the claim. *Id.* (citing *Roumillat v. Simplistic Enter., Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992)).

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Plaintiffs allege in their complaint that the City breached its “duty to exercise ordinary care to maintain its streets and public ways in a reasonably safe condition for all who use them in a proper manner.” They also allege that the City, pursuant to a 30 November 1999 contract with ACS, agreed “to perform certain acts under the Safelight Program for the City of Fayetteville.”

The City responds that it is entitled to summary judgment for a number of reasons. One of the reasons asserted by the City is that it had no duty—contractual or otherwise—to maintain Highway N.C. 24 in a safe condition for the benefit of plaintiffs’ decedent. Rather the City asserts that the duty belonged to the North Carolina Department of Transportation (“NCDOT”). The City further asserts that, even if another party along with the NCDOT could be negligent, it would not be the City, as it was ACS’s predecessor, Lockheed Martin, who was responsible for the installation and maintenance of the red-light camera and plaintiffs did not in their complaint allege any theory of *respondeat superior*. The City additionally argues that it was not negligence as a matter of law for the camera to be installed on the raised median, that the City is entitled to the benefit of governmental immunity, and that, in any event, Ms. May was contributorily negligent as a matter of law.

The trial court did not state a specific basis for granting the motion for summary judgment, but we conclude that there are at least three bases for upholding its order. Thus, we affirm the trial court’s granting of the City’s summary judgment motion.

First we note that the City owed plaintiffs no affirmative duty to keep N.C. 24 in a safe condition for plaintiffs’ decedent, Ms. May. Plaintiffs allege in their complaint that:

The law requires cities to keep their streets and public ways in proper repair, open for travel, and free from unnecessary hazards or obstructions. This means that every city has a duty to exercise ordinary care to maintain its streets and public ways in a reasonably safe condition for all who use them in a proper manner. A breach of this duty is negligence.

However, this legal allegation, the wording of which is apparently drawn from N.C.G.S. § 160A-296(a)(2), is inapplicable to the present case as N.C. 24 is not the City’s street or public way. All parties agree that N.C. 24, Bragg Boulevard, is a state highway. Municipalities do not generally owe any duty to individuals injured on roads that are

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part of the state highway system. N.C. Gen. Stat. § 160A-297 (2009); *see also Jiggetts v. City of Gastonia*, 128 N.C. App. 410, 413, 497 S.E.2d 287, 290 (1998); *Columbo v. Dorrity*, 115 N.C. App. 81, 85, 443 S.E.2d. 752, 755 (1994) (“[A] municipality is not liable for accidents which occur on a street which is part of the State highway system and under the control of the NCDOT.”).

There is an exception to this general rule. A plaintiff who can establish that he or she is a third party beneficiary of a contract between a municipality and the NCDOT who is injured upon the highway which is the subject of that contract may bring an action against the municipality to recover damages for injuries arising from his or her use of the highway. *E.g., Matternes v. City of Winston-Salem*, 286 N.C. 1, 12, 209 S.E.2d 481, 487 (1974). In order to maintain a suit based upon this third party beneficiary breach of contract theory, the plaintiff must “show ‘(1) the existence of a contract between [the defendant and the NCDOT]; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for [the plaintiff’s] direct, and not incidental, benefit.’” *Metric Constructors, Inc. v. Indus. Risk Insurers*, 102 N.C. App. 59, 63, 401 S.E.2d 126, 129, *aff’d*, 330 N.C. 439, 410 S.E.2d 392 (1991) (quoting *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 79 N.C. App. 81, 86, 339 S.E.2d 62, 65 (1986), *rev’d on other grounds*, 322 N.C. 200, 367 S.E.2d 609 (1988)).

The existence of a contract between a city and the NCDOT for the maintenance of a street within the state highway system does not automatically shift liability for injury from the NCDOT to the City; such liability must arise expressly out of contract. *See Jiggetts*, 128 N.C. App. at 415, 497 S.E.2d at 291. In their amended complaint, plaintiffs point to the Encroachment Agreement between the City and the NCDOT, which they claim shifted liability from the NCDOT and contractually created the City’s duty of care to individuals injured on NCDOT highways within the City. Specifically they point to the following portion of the Encroachment Agreement:

[T]he [City] binds and obligates himself [sic] to install and maintain the encroaching facility in such safe and proper condition that it will not interfere with or endanger travel upon said highway, nor obstruct nor interfere with the proper maintenance thereof, to reimburse the [NCDOT] for the cost incurred for any repairs or maintenance to its roadways and structures necessary due to the installation and existence of the facilities of the [City], and if at any time the [NCDOT] shall require the removal of or changes in

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the location of the said facilities, that the [City] binds himself [sic], his [sic] successors, and assigns, to promptly remove or alter the said facilities, in order to conform to the said requirement without any cost to the [NCDOT].

Plaintiffs allege in their amended complaint that the City's contractual duty "to install and maintain the encroaching facility in such safe and proper condition that it will not interfere with or endanger travel upon said highway" is consistent with the City's duties on its own streets and highways under N.C.G.S. § 160A-206(a)(2). Plaintiffs assert then that Ms. May, as a member of the traveling public, was a third-party beneficiary of the Encroachment Agreement.

The paragraph identified by plaintiffs falls short of what is required in order to shift responsibility for N.C. 24 from the NCDOT to the City. The Encroachment Agreement does not assign the City the same duties over N.C. 24 as the City has for its own streets and highways under N.C.G.S. § 160A-296(a)(2): namely, "(1) [t]he duty to keep the public streets, sidewalks, alleys, and bridges in proper repair" and "(2) [t]he duty to keep the public streets, sidewalks, alleys, and bridges open for travel and free from unnecessary obstructions."

Finally, even had the Encroachment Agreement's requirement that the City maintain the red-light camera "in such [a] safe and proper condition that it [would] not interfere with or endanger travel upon said highway" been sufficient to transfer the liability for N.C. 24 from the NCDOT to the City, plaintiffs' decedent Ms. May was not a third-party beneficiary of the Encroachment Agreement. In order for plaintiffs to sue on a third-party beneficiary theory, they must show that the contract which creates the failed duty was "entered into for [their] direct, *and not incidental*, benefit." *Jiggets*, 128 N.C. App. at 415-16, 497 S.E.2d at 191 (emphasis added) (internal quotation marks omitted). The purpose of the Encroachment Agreement was not to transfer the liability for injuries to the traveling public on N.C. 24 from NCDOT to the City, making all members of the traveling public third party beneficiaries of the Encroachment Agreement. Rather, the City's contractual duties created by the Encroachment Agreement benefitted the NCDOT, in that the Agreement assured that the NCDOT's duties to maintain N.C. 24 were not made more onerous by the installation of the red-light camera. In addition to the City's obligation to assure that the red-light camera did not interfere with or endanger travel upon N.C. 24, the City was also required to reimburse

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the NCDOT for any costs incurred for repair or maintenance to N.C. 24 because of the installation or existence of the red-light camera. The Encroachment Agreement also required the City to indemnify the NCDOT for any damage or claim for damage that the NCDOT may incur because of the red-light camera, to restore all area disturbed during the installation of the red-light camera, to pay for any necessary inspections, and to follow various other regulations, including solicitation and nondiscrimination requirements. In exchange, the NCDOT permitted the City to install the red light camera in order that the City's traffic ordinances could be more effectively enforced.

Thus, on this basis alone, the trial court properly granted the City's motion for summary judgment because the City had no duty to maintain Highway N.C. 24 in a safe condition for the benefit of plaintiffs' decedent, Ms. May. However, we find it worthwhile to note for the sake of clarity that, even had Ms. May been a third party beneficiary of the Encroachment Agreement, as a matter of law, the City did not breach its duty under that Agreement to "install and maintain the encroaching facility in such a safe and proper condition that it will not interfere with or endanger travel upon said highway."

"The maintenance of a utility pole along a public highway does not constitute an act of negligence unless the pole constitutes a hazard to motorists using the portion of the highway designated and intended for vehicular travel in a *proper manner*." *Mosteller v. Duke Energy Corp.*, — N.C. App. —, —, 698 S.E.2d 424, 446 (2010) (quoting *Shapiro v. Toyota Motor Co., Ltd.*, 38 N.C. App. 658, 663, 248 S.E.2d 868, 871 (1978) (holding that the maintenance of a utility pole twelve and a half inches outside of the roadway on a public highway's right-of-way did not constitute an act of negligence because the pole did not constitute a hazard to motorists properly using the portion of the highway designated and intended for vehicular travel)); *see also Wood v. Carolina Tel. & Tel. Co.*, 228 N.C. 605, 607, 46 S.E.2d 717, 718 (1948) (holding that the maintenance of a utility pole six inches outside of the roadway did not constitute an act of negligence per se because the pole was located off the roadway itself in the area between the curb and the sidewalk).

Plaintiffs do not contest that Ms. Polumbo "recklessly drove her vehicle" and "improperly [turned] into the curb and [drove] onto the concrete median whereupon the vehicle struck an aluminum utility pole upon which [the] 'redlight camera' was mounted." They furthermore acknowledge that in doing so, Ms. Polumbo "improperly drove

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a motor vehicle upon a concrete median area in violation of N.C.G.S. § 20-160(b)." Thus it is clear that even had the placement of the utility pole been negligent, Ms. Polumbo's intervening negligence would be the proximate cause of Ms. May's injuries. *See Mosteller*, — N.C. App. at —, 698 S.E.2d at 445-46. Plaintiffs argue, however, that a new distinction should be drawn because the red-light camera in the present case was an obstruction "on a traffic island within a highway itself and around which traffic may reasonably be expected to flow on a fairly constant basis."

No North Carolina caselaw draws the distinction urged upon us by plaintiffs based upon where outside the proper portion of the roadway the obstruction is located. This State's courts have only drawn a distinction based upon whether the plaintiff was properly using the portion of the highway designated and intended for vehicular travel. We hold, therefore, that, as a matter of law, the installation of the red-light camera mounted upon the utility pole did "not interfere with or endanger travel upon said highway." It was only by Ms. Polumbo improperly leaving the highway and driving her vehicle onto the concrete median area, that the collision occurred. The City did not, therefore, breach its duty under the Encroachment Agreement.

[4] Additionally, there exists at least one other basis upon which we must affirm the grant of summary judgment to the City, as well as to ACS, and that is the contributory negligence, as a matter of law, of plaintiffs' decedent Ms. May. It is well established in North Carolina that a passenger is contributorily negligent as a matter of law so to bar recovery in a negligence suit when (1) the driver of the vehicle was under the influence of an intoxicant; (2) the passenger knew or should have known that the driver was under the influence; and (3) the passenger voluntarily rode with the driver even though she knew or should have known that the driver was under the influence. *E.g., Coleman v. Hines*, 133 N.C. App. 147, 149, 515 S.E.2d 57, 59, *disc. review denied*, 350 N.C. 826, 539 S.E.2d 281 (1999). In determining whether the passenger knew or should have known that the driver was under the influence, our courts apply an "ordinary prudent man" standard. *See Taylor*, 180 N.C. App. at 213, 636 S.E.2d at 583.

Plaintiffs assert in their complaint that Ms. Polumbo was driving under the influence of alcohol, and they do not contest that Ms. May voluntarily rode with her. They argue, however, that Ms. May did not know, nor did she have reason to know, that Ms. Polumbo was under the influence of alcohol. Specifically, plaintiffs allege that:

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Upon information and belief, Emily Elizabeth May did not know nor have reason to know that Defendant Polumbo had consumed alcoholic beverages while she and Defendant Polumbo were at Secrets or that Defendant Polumbo was under the influence of an intoxicating substance at the time she entered Defendant Polumbo's vehicle at the time she [and] defendant Polumbo left Secrets at approximately 1:15 am, on May 17, 2007.

Plaintiffs overlook, however, allegations in their complaint that, shortly prior to the accident, employees of defendant Carolina Hospitality continued to serve alcoholic beverages to Ms. Polumbo "after they became aware, or should have been aware in the exercise of reasonable care" that she was intoxicated. They allege that one of those employees, Ms. Reaves, served Ms. Polumbo "numerous single shot glassfuls of liquor." They allege in fact that Ms. Polumbo consumed such "a large quantity of alcoholic beverages" that she was "extremely intoxicated," "her mental and physical faculties were appreciably impaired," and her blood alcohol content was over two times the legal limit.

A party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive against the pleader. The party cannot subsequently take a position contradictory to his pleadings. *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964) (citing *Universal C. I. T. Credit Corp. v. Saunders*, 235 N.C. 369, 372, 70 S.E.2d 176, 178 (1952)). Plaintiffs' own complaint, considered in the light most favorable to it, leads to the inescapable conclusion that Ms. May knew or should have known that Ms. Polumbo was "appreciably impaired" and, therefore, was intoxicated to a degree that she was incapable of safely operating her vehicle. If Ms. Polumbo's condition was so impaired as to have been obvious to a reasonable person in the position of defendant Ms. Reaves, the server employed by Carolina Hospitality, it was at least as obvious to Ms. May, who had spent the entire evening with Ms. Polumbo. Yet Ms. May still placed herself in a position of extreme known danger by voluntarily riding with Ms. Polumbo and, thus, Ms. May was contributorily negligent as a matter of law.

Further establishing Ms. May's contributory negligence, we note that there is additional uncontroverted evidence showing that an ordinarily prudent man in Ms. May's position either would have or should have known that Ms. Polumbo was appreciably impaired at

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the time of the accident. Arriving on the scene shortly after the accident, Officer Watson was able to detect a “strong odor of alcohol” coming from Ms. Polumbo. Ms. Polumbo had trouble standing up after the accident; she “had an unsteady gait and she repeatedly stumbled and tried to regain her balance.” Officer Watson noted that she was “visibly impaired,” and so he arrested her and took her to Cumberland County Jail, where he administered a field sobriety test. At the jail shortly after the accident, Ms. Polumbo exhibited problems with following directions, had difficulty balancing, and blew a .17 and .18 on her two breathalyzer tests, indicating that her blood alcohol level was more than twice the legal limit. *See Taylor*, 180 N.C. App. at 214-15, 636 S.E.2d at 583-84 (holding that there was no genuine issues of material fact as to plaintiff’s contributory negligence because an ordinarily prudent man would have or should have known that defendant was intoxicated when he spent seven hours with the defendant at a bar, knew at the beginning of the evening that defendant intended to drink, smelled alcohol on defendant’s breath when he gave her occasional kisses over the course of the evening, and “[m]oreover, defendant blew a .18 on the breathalyzer”); *Goodman v. Connor*, 117 N.C. App. 113, 117-18, 450 S.E.2d 5, 7-8 (holding that passenger was contributorily negligent as he knew or should have known of driver’s intoxicated condition when the driver’s breathalyzer test registered between .10 and .11 four hours after accident, toxicological chemist testified that driver would have appeared drunk to anyone who observed him at time of accident, and state trooper who arrived at scene of accident testified that driver did appear intoxicated), *disc. review denied*, 338 N.C. 668, 453 S.E.2d 177 (1994).

We hold, therefore, that, by voluntarily riding and continuing to ride with Ms. Polumbo under such circumstances and conditions as would have compelled an ordinarily prudent man in the exercise of ordinary care for his own safety to not ride with the “appreciably impaired” Ms. Polumbo, Ms. May committed an act of contributory negligence which proximately contributed to her injuries and death as a matter of law, and which bars any recovery from ACS or the City for her death.

## III.

We now turn to the merits of plaintiffs’ appeal of the summary judgment order granted in favor of ACS. Plaintiffs’ complaint only alleged that ACS was negligent in its installation and manufacture of the red-light camera. ACS argues that it was not negligent as a matter

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of law in its placement, selection, and installation of the red-light camera and that, even if it had been negligent, its negligence is insulated by the intervening and superseding negligence of other Defendants ACS also asserts that statute of repose bars plaintiffs' wrongful death claim against ACS and that it is immune as a matter of law because it installed the red-light camera with proper care and skill pursuant to its contract with the City. Finally, ACS asserts that any recovery for any negligence that it may have committed is barred because of the contributory negligence of Ms. May. For the reasons stated above, Ms. May's own contributory negligence bars, as a matter of law, plaintiffs' recovery from ACS and we find it unnecessary to reach the other arguments raised by the parties.

Summary Judgment in favor of the City and ACS is affirmed.

*Affirmed.*

Judges McGEE and ERVIN concur.



BRIAN Z. FRANCE, PLAINTIFF-APPELLANT v. MEGAN P. FRANCE, DEFENDANT-APPELLEE

No. COA10-313  
No. COA10-425

(Filed 1 February 2011)

**1. Jurisdiction— subject matter—order entered after appeal—trial court divested of jurisdiction**

A trial judge's order granting movant's request to have the proceedings in a domestic action open to the public was a nullity where the order was entered after plaintiff's appeal from the trial judge's first order denying plaintiff's motion to have the proceedings in the action closed. The trial court was without jurisdiction to hear movant's motion because jurisdiction in the matter had transferred to the Court of Appeals.

**2. Appeal and Error— interlocutory orders and appeals—a substantial right affected—immediately appealable**

Plaintiff's appeal from the trial court's interlocutory order denying plaintiff's motion to have the proceedings in a domestic action closed affected a substantial right and was immediately appealable.

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**3. Courts— public access to proceedings—no compelling countervailing public interests**

Judge Culler's order denying plaintiff's motion to close the proceedings in a domestic case did not impermissibly overrule Judge Owens' previously entered order sealing the documents filed in the domestic case. Moreover, Judge Culler correctly ruled that there were no compelling countervailing public interests as related to these parties which outweighed the public's right of access to open court proceedings.

Appeals by Plaintiff from orders entered 13 November 2009 (COA10-313) and 18 December 2009 (COA10-425) by Judge Jena P. Culler in District Court, Mecklenburg County. Heard in the Court of Appeals 28 September 2010. Pursuant to N.C.R. App. P. 40, these cases were consolidated for hearing as the issues presented by Plaintiff's appeals to this Court involve common questions of law.

*Horack Tally Pharr & Lowndes, P.A., by Kary C. Watson and Gena Graham Morris; and Alston & Bird, LLP, by John E. Stephenson, Jr., for Plaintiff-Appellant.*

*Davis & Harwell, P.A., by Joslin Davis and Loretta C. Biggs, for Defendant-Appellee.*

*K&L Gates LLP, by Raymond E. Owens, Jr. and Christopher C. Lam, for Media Movants.*

McGEE, Judge.

Plaintiff and Defendant entered into a Contract of Separation, Property Settlement, Child Support, Child Custody and Alimony Agreement (the Agreement) on 17 December 2007. One of the provisions of the Agreement concerned confidentiality. Plaintiff and Defendant agreed that “neither party [would] disclose any financial information relating to the other party or any provision of th[e] Agreement to anyone except” certain professionals, such as their attorneys and financial advisors, unless compelled by law. Plaintiff and Defendant further agreed to keep private certain personal information regarding each other “unless either party is legally compelled to disclose any such information[.]” The Agreement stated that breach of the confidentiality provision would constitute a material breach. In the final paragraph of the confidentiality clause, Plaintiff and Defendant agreed

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that if either of them institutes or responds to litigation that relates to and requires disclosure of any of the terms of th[e] Agreement, [Plaintiff and Defendant] agree to use their best efforts so that any reference to the terms of th[e] Agreement and the Agreement itself will be filed under seal, with prior notice to the other party.

Plaintiff filed a complaint against Defendant on 11 September 2008, 08 CVD 20661, seeking an order directing the Mecklenburg County Clerk of Superior Court to seal Plaintiff's complaint and any future pleadings and documents filed in that action. Plaintiff amended his complaint on 17 September 2008. Judge N. Todd Owens issued an order (Judge Owens' order) on 18 December 2008 in which he ruled:

The Clerk of Superior Court shall seal the pleadings and other documents [and] [t]he Clerk . . . is directed to file under seal any pleadings and documents filed in any subsequent actions between the parties related to the Agreement [and all such pleadings, documents, and orders] may be unsealed only by further order of the [c]ourt, after reasonable notice to the parties.

Judge Owens based his ruling on conclusions of law<sup>1</sup> that:

2. There is a compelling countervailing public interest in protecting the privacy of the parties as relates to the provisions of the Agreement concerning their young children and their financial affairs, and in avoiding damage or harm to the parties, their business interests, and their children which could result from public access to such provisions of the Agreement.
3. There is a compelling countervailing public interest in protecting the sanctity of contracts such as the Agreement, where people bargain for and agree upon a mechanism to resolve future disputes in a confidential manner and other contract terms which are not contrary to law, and where each party relies on the other party to perform his or her obligations under the contract.
4. The aforesaid countervailing public interests in paragraphs 2 and 3 above outweigh the public's interest in access to the documents filed in this court proceeding and in future proceedings between the parties concerning the Agreement.

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1. Though not labeled "conclusions of law" in Judge Owens' order, we look past the labels and treat conclusions as conclusions. *In re R.A.H.*, 182 N.C. App. 52, 60, 641 S.E.2d 404, 409 (2007) ("If a finding of fact is essentially a conclusion of law it will be treated as a conclusion of law which is reviewable on appeal." (citations, quotation marks, ellipses, and brackets omitted)).

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5. The Court has considered whether there are alternatives to sealing the court files in order to protect the public interests referred to in paragraphs 2 and 3 above, and finds there are no such alternatives.

Plaintiff then filed a new complaint, under seal, on 31 December 2008 (the complaint), 08 CVS 28389, in which Plaintiff alleged Defendant had violated certain terms of the Agreement, including the confidentiality clause. Plaintiff specifically referenced Judge Owens' order and incorporated it in the complaint. Plaintiff's first claim for relief was for rescission of the Agreement, which, we note, would render void the confidentiality clause. Plaintiff's alternate claims for relief were for specific performance and breach of contract. Defendant filed an answer, affirmative defenses, and counterclaim on 5 March 2009.

Plaintiff filed motions to seal the proceedings and for a preliminary injunction on 29 September 2009. These motions were heard before Judge Jena P. Culler on 15 October 2009. Defendant joined Plaintiff in seeking to have the proceedings in the action closed. By order filed 13 November 2009 (Judge Culler's first order), Judge Culler denied both Plaintiff's motion to close the proceedings and Plaintiff's motion for a preliminary injunction. Judge Culler further ordered: "Proceedings in this case shall be conducted in open court." Judge Culler based her ruling on her conclusion of law that: "Although both parties affirmatively sought the relief of closing the court proceedings in this litigation, there are no compelling countervailing public interests as related to these parties which outweigh the public's right and access to open court proceedings." Plaintiff appealed Judge Culler's first order on 13 November 2009.

The Charlotte Observer Publishing Company and WCNC-TV, Inc. (Media Movants) filed a motion to determine access to judicial proceedings and documents in these matters on 17 November 2009, whereby they requested that Judge Culler "[o]rder [that] the courtroom remain open to the public and press in both 08 CVD 20661 and 08 CVD 28389" and that she also order that "the records and court files in both [actions] be unsealed[.]" Judge Culler heard Media Movant's motion on 11 December 2009. In an order filed 18 December 2009 (Judge Culler's second order), Judge Culler acknowledged Judge Owens' order. In Judge Culler's second order, she stated that she had previously ordered the proceedings to be open. Judge Culler then ordered that all "proceedings in connection with 08 CVD 20661

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shall be open to the public [and that] the court has already ordered that all courtroom proceedings in connection with 08 CVD 28389 shall be open, and that order has been appealed [and that all court files relating to both 08 CVD 20661 and 08 CVD 28389] shall be unsealed." Judge Culler based her rulings on conclusions of law that there were "no compelling countervailing public or governmental interest[s] sufficient" to keep the court filings under seal, or to conduct the proceedings in a closed courtroom. Judge Culler further concluded that:

4. There [are] no compelling countervailing public or governmental interest[s] to be protected as it relates to the parties that outweighs the public's longstanding presumptive right to open courts as espoused in the North Carolina Constitution, North Carolina statutory law, . . . and the related case law[.]

Judge Culler's second order was to be "effective at 12:00 p.m. on December 31, 2009." Plaintiff filed notice of appeal from Judge Culler's second order on 21 December 2009 and also filed a motion to stay Judge Culler's second order. In an order entered that same day, Judge Culler denied Plaintiff's motion to stay. By motion filed 22 December 2009, Plaintiff moved our Court to stay Judge Culler's first and second orders. By order entered 23 December 2009, our Court granted Plaintiff's motion to stay "pending determination of [Plaintiff's] petition for writ of supersedeas." On 4 January 2010, our Court granted Plaintiff's petition for writ of supersedeas, and stayed implementation of Judge Culler's first and second orders "pending further orders of this Court."

*Plaintiff's Second Appeal (COA10-425)*

[1] Plaintiff appealed Judge Culler's first order on 13 November 2009. As our Court held in *RPR & Assocs. v. University of N.C.-Chapel Hill*, 153 N.C. App. 342, 346-47, 570 S.E.2d 510, 513-14 (2002),

[a]s a general rule, once a party gives notice of appeal, such appeal divests the trial court of its jurisdiction, and the trial judge becomes *functus officio*. See *Bowen v. Motor Co.*, 292 N.C. 633, 635, 234 S.E.2d 748, 749 (1977); *Sink v. Easter*, 288 N.C. 183, 197, 217 S.E.2d 532, 541 (1975). *Functus officio*, which translates from Latin as "having performed his o[r] her office," is defined as being "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished." Thus, when a court is *functus officio*, it has completed its duties pending the decision of the appellate court. The

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principle of *functus officio* stems from the general rule that two courts cannot ordinarily have jurisdiction of the same case at the same time. *See Wiggins v. Bunch*, 280 N.C. 106, 110, 184 S.E.2d 879, 881 (1971).

It follows from the principle of *functus officio* that if a party appeals an immediately appealable interlocutory order, the trial court has no authority, pending the appeal, to proceed[.]

Judge Culler's second order was entered on 18 December 2009, following a hearing that was held 11 December 2009. Plaintiff's appeal of Judge Culler's first order on 13 November 2009 divested the trial court of jurisdiction in the matter<sup>2</sup> and jurisdiction transferred to this Court. Thus, Judge Culler's second order is a nullity because the trial court was without jurisdiction to hear the matter on 11 December 2009. *See Hall v. Cohen*, 177 N.C. App. 456, 458, 628 S.E.2d 469, 471 (2006) ("As a general rule, an appellate court's jurisdiction trumps that of the trial court when one party files a notice of appeal unless the case has been remanded from the appellate court for further determination in the trial court.") (Citations omitted). We therefore must vacate Judge Culler's second order. *RPR & Assocs.*, 153 N.C. App. at 346-47, 570 S.E.2d at 513-14.

*Plaintiff's First Appeal (COA10-313)*

[2] We first note that Plaintiff attempts to appeal from an interlocutory order because Judge Culler's first order does not finally dispose of all issues in these actions. *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001). "[A]n immediate appeal may be taken from an interlocutory order . . . when the challenged order affects a substantial right of the appellant that would be lost without immediate review." *Id.* at 165, 545 S.E.2d at 261 (citations omitted). Absent immediate review, documents that have been ordered sealed will be unsealed, and proceedings will be held open to the public. Because the only manner in which Plaintiff may prevent this from happening is through immediate appellate review, we hold that a substantial right of Plaintiff is affected by Judge Culler's first order and thus immediate appeal is proper in this case. *See Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 23-24, 541 S.E.2d 782, 786 (2001).

[3] It is well established that one trial court judge may not overrule another trial court judge's conclusions of law when the same issue is

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2. We hold below that Judge Culler's first order was immediately appealable. *See RPR & Assocs.*, 153 N.C. App. at 347, 570 S.E.2d at 514.

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involved. “ ‘[N]o appeal lies from one Superior Court judge to another; . . . one Superior Court judge may not correct another’s errors of law; and . . . ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.’ ” *State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003) (citation omitted). In the present case, Judge Owens ruled as a matter of law that: “There are compelling countervailing public interests which outweigh the public’s interest in access to the documents filed in court proceedings between the parties concerning the Agreement.” In Judge Culler’s first order, Judge Culler ruled as a matter of law that “there are no compelling countervailing public interests as related to these parties which outweigh the public’s right and access to open court proceedings.” Based upon this conclusion of law, Judge Culler denied Plaintiff’s motion to close the proceedings, and ordered that the matter proceed in open court.

Though Judge Owens and Judge Culler were required to conduct the same legal analysis in making their respective rulings, the factual situations before them were different. Judge Owens’ order is limited to a ruling that all pleadings and documents in any action related to the Agreement be sealed. Judge Culler’s first order is limited to a ruling that the actual court proceedings, and the courtroom, remain open to the public. Judge Culler’s first order did not address the pleadings and other documents related to the actions before us. Because Judge Culler’s first order did not rule that the pleadings and documents in these actions should be unsealed, Judge Culler’s first order does not impermissibly overrule Judge Owens’ order.<sup>3</sup> See *State v. Woolridge*, 357 N.C. 544, 549-50, 592 S.E.2d 191, 194-95 (2003); *Adkins v. Stanly County Bd. of Educ.*, — N.C. App. —, 692 S.E.2d 470 (2010). Because we have held that Judge Culler was without jurisdiction to enter her second order, we do not address Judge Culler’s apparent attempt to modify, overrule, or change the judgment rendered in Judge Owens’ order.

We must now decide whether Judge Culler was correct in ruling that “there are no compelling countervailing public interests as

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3. We do not believe the portion of Judge Owens’ order stating that the documents in the case “may only be unsealed by further order of the [c]ourt” provided Judge Culler authority to overrule Judge Owens’ conclusions of law absent a finding of changed circumstances. See *Morris v. Gray*, 181 N.C. App. 552, 552-53, 640 S.E.2d 737, 738 (2007) (“Unless a material change of circumstances in the situations of the parties so warrants, one trial judge cannot modify, overrule, or change the judgment of another, equivalent trial judge.”) (citation omitted).

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related to these parties which outweigh the public's right and access to open court proceedings." Our Supreme Court has stated:

"The paramount duty of the trial judge is to supervise and control the course of the trial so as to prevent injustice." Thus, even though court records may generally be public records under N.C.G.S. § 132-1, a trial court may, in the proper circumstances, shield portions of *court proceedings* and records from the public; the power to do so is a necessary power rightfully pertaining to the judiciary as a separate branch of the government, and the General Assembly has "no power" to diminish it in any manner. N.C. Const. art. IV, § 1[.] This necessary and inherent power of the judiciary should only be exercised, however, when its use is required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of our government will be more harmful than beneficial.

*Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 463, 515 S.E.2d 675, 685 (1999) (internal citations omitted) (emphasis added). Our General Assembly may, however, dictate "by statute that certain documents will *not* be available to the public[.]" *Id.* at 473, 515 S.E.2d at 691 (citations omitted) (emphasis added). Our General Assembly has the right to make a determination that public interests outweigh both the common law right to inspect public records, *see id.*, and the Public Records Act, N.C. Gen. Stat. §§ 132-1 to 10, *see Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 489-91, 616 S.E.2d 602, 605-06 (2005). Our General Assembly has made the policy decision that certain kinds of otherwise public records shall be shielded from public scrutiny. *See, e.g., Virmani*, 350 N.C. at 473, 515 S.E.2d at 691 ("proceedings of a medical review committee and the records and materials produced and considered by such a committee 'shall be confidential and not considered public records' "); *Knight*, 172 N.C. App. at 491, 616 S.E.2d at 606 (certain personnel records of public hospital employees exempt from Public Records Act); *McCormick v. Hanson Aggregates Southeast, Inc.*, 164 N.C. App. 459, 469-70, 596 S.E.2d 431, 437-38 (2004) (certain written communications from an attorney representing a governmental body to that governmental body not subject to public access for three years pursuant to the Public Records Act); *id.* at 471 n. 4, 596 S.E.2d at 438 n. 4 (work product of the Office of the North Carolina Attorney General is not a public record).

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“Article I, Section 18 [of the North Carolina Constitution] provides the public access to our courts.” *Virmani*, 350 N.C. at 475, 515 S.E.2d at 693 (citations omitted). “Article I, Section 18 of the North Carolina Constitution guarantees a *qualified* constitutional right on the part of the public to attend civil court proceedings.” *Id.* at 476, 515 S.E.2d at 693. “We begin with the presumption that the civil court proceedings and records at issue in this case must be open to the public, including the news media, under Article I, Section 18.” *Id.* at 477, 515 S.E.2d at 693.

The qualified public right of access to civil court proceedings guaranteed by Article I, Section 18 is not absolute and is subject to reasonable limitations imposed in the interest of the fair administration of justice or for other compelling public purposes. Thus, although the public has a qualified right of access to civil court proceedings and records, the trial court may limit this right when there is a compelling countervailing public interest and closure of the court proceedings or sealing of documents is required to protect such countervailing public interest. In performing this analysis, the trial court must consider alternatives to closure. Unless such an overriding interest exists, the civil court proceedings and records will be open to the public. Where the trial court closes proceedings or seals records and documents, it must make findings of fact which are specific enough to allow appellate review to determine whether the proceedings or records were required to be open to the public by virtue of the constitutional presumption of access.

*Id.* at 476-77, 515 S.E.2d at 693 (internal citations omitted). “[U]nder the common law the decision to grant or deny access is “left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.”’” *In re Search Warrants Issued in Connection with the Investigation into the Death of Nancy Cooper*, — N.C. App. —, —, 683 S.E.2d 418, 425 (2009) (citations omitted).

Beginning with the “presumption that the civil court proceedings and records at issue in this case must be open to the public, including the news media, under Article I, Section 18[,]” *Virmani*, 350 N.C. at 477, 515 S.E.2d at 693, we find no abuse of the trial court’s discretion in ruling that Plaintiff failed to overcome this presumption by demonstrating that the public’s right to open proceedings was outweighed by a countervailing public interest. Plaintiff argues that

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the qualified right to open court proceedings is outweighed by his constitutional right to contract, the right to seek redress for injury, and “the right of privacy in matters related to minor children and . . . personal and financial affairs.”

In his argument concerning his right to contract, Plaintiff states that “unless a contract is contrary to public policy or prohibited by statute, the freedom to contract requires that it be enforced. *See Turner v. Masias*, 36 N.C. App. 213, 217, 243 S.E.2d 401, 404 (1978).” We hold that if the Agreement requires automatic and complete closure of the proceedings in this matter, then the Agreement is in violation of public policy—the qualified public right of access to civil court proceedings guaranteed by Article I, Section 18. Were we to adopt Plaintiff’s position, any civil proceeding could be closed to the public merely because any party involved executed a contract with a confidentiality clause similar to that contained in the Agreement in this matter. Plaintiff’s right to contract is in no way violated; we merely hold that Plaintiff cannot, by contract, circumvent established public policy—the qualified public right of access to civil court proceedings. Plaintiff must show some independent countervailing public policy concern sufficient to outweigh the qualified right of access to civil court proceedings.

Plaintiff’s position would also render meaningless provisions of the Public Records Act, N.C. Gen. Stat. § 132-1 (1995). *Virmani*, 350 N.C. at 462-63, 515 S.E.2d at 685 (Transcripts of civil court proceedings are public records under the Public Records Act. “The term ‘public records,’ as used in N.C.G.S. § 132-1, includes all documents and papers made or received by any agency of North Carolina government in the course of conducting its public proceedings. N.C.G.S. § 132-1(a) (1995). The public’s right of access to court records is provided by N.C.G.S. § 7A-109(a), which specifically grants the public the right to inspect court records in criminal and civil proceedings. N.C.G.S. § 7A-109(a) (1995).”). Further, the contract states that Plaintiff and Defendant will “use their best efforts so that any reference to the terms of th[e] Agreement and the Agreement itself will be filed under seal[.]” The Agreement contains nothing requiring either Plaintiff or Defendant to use best efforts to obtain a closed proceeding.

We hold that, in the present case, the trial court was correct to determine whether proceedings should be closed based upon the nature of the evidence to be admitted and the facts of this specific case. Evidence otherwise appropriate for open court may not be

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sealed merely because an agreement is involved that purports to render the contents of that agreement confidential. Certain kinds of evidence may be such that the public policy factors in favor of confidentiality outweigh the public policy factors supporting free access of the public to public records and proceedings. *See, e.g.*, N.C. Gen. Stat. § 15-166 (2009) (“In the trial of cases for rape or sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, during the taking of the testimony of the [victim], exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case.”); N.C. Gen. Stat. § 48-2-203 (2009) (“A judicial hearing in any proceeding pursuant to this Chapter [adoption of a minor child] shall be held in closed court.”); N.C. Gen. Stat. § 66-156 (2009) (“In an action under this Article, a court shall protect an alleged trade secret by reasonable steps which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action subject to further court order, and ordering any person who gains access to an alleged trade secret during the litigation not to disclose such alleged trade secret without prior court approval.”); *Virmani*, 350 N.C. at 478, 515 S.E.2d at 694 (“The public’s interest in access to these court proceedings, records and documents is outweighed by the compelling public interest in protecting the confidentiality of medical peer review records in order to foster effective, frank and uninhibited exchange among medical peer review committee members.”); *Knight*, 172 N.C. App. at 495, 616 S.E.2d at 609 (“Whatever the General Assembly’s policy considerations, the language employed by the General Assembly shows that it was concerned about protecting the confidentiality of public hospital personnel information, thereby specifically exempting this information from broad public access.”).

By contrast, our appellate courts have ruled for the disclosure of traditionally confidential records pursuant to the Public Records Act. *See, e.g.*, *Carter-Hubbard Pub’g Co. v. WRMC Hosp. Operating Corp.*, 178 N.C. App. 621, 628, 633 S.E.2d 682, 687 (2006) (contracts between public hospitals and HMOs may be required to be disclosed excepting parts of contracts that contain “competitive health care information”); *see also, Womack Newspapers, Inc. v. Town of Kitty Hawk*, 181 N.C. App. 1, 14, 639 S.E.2d 96, 104-05 (2007) (files and work product of city attorney may be required to be disclosed pursuant to the Public Records Act). Plaintiff points to no statutory support for any contention that the Agreement should be excepted from the Public Records Act, and we find none.

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The two additional reasons Plaintiff gives in support of closing the courtroom fail to implicate reasons of public policy sufficient to override the qualified public policy right of open proceedings. First, Plaintiff fails to show that the decision to deny Plaintiff's request for closed proceedings will deny Plaintiff "redress in the court for an injury done to him." Plaintiff has in no manner been prevented from proceeding with his action. Again, if Plaintiff succeeds in his primary action for rescission of the Agreement, the confidentiality clause contained in the Agreement will no longer have any effect. Further, as we have held that Judge Owens' order must remain in effect until and unless it is properly overturned, the contents of the Agreement must remain sealed and confidential upon remand. Plaintiff can demonstrate no injury.

Second, we hold that Plaintiff's claim that his "constitutional right of privacy, particularly with respect to matters surrounding the parenting of minor children," will be violated is without merit, and Plaintiff fails to show that any such right to privacy outweighs the qualified right of the public to open proceedings. Plaintiff cites no authority in support of his claim that any "compelling interest" exists to close the proceedings in the *present* case for the protection of his children, especially as Plaintiff argues that the entire proceeding should be closed, not just the portions involving information concerning his minor children. While a trial court may close proceedings to protect minors in certain situations, such as where a child is testifying about alleged abuse that child has suffered, or adoption proceedings, N.C.G.S. § 48-2-203, we can find no case supporting the closing of an entire proceeding merely because some evidence relating to a minor child would be admitted. We hold that it is the province of the trial court to determine when a proceeding will be closed to protect a minor child, absent a specific statutory mandate such as in N.C.G.S. § 48-2-203.

In most instances, a proceeding will only be closed during the testimony of the minor child. Plaintiff has presented nothing on appeal demonstrating that the trial court abused its discretion by denying Plaintiff's motion to close the proceeding merely because some evidence concerning his minor children could be admitted. If, during the course of a proceeding, the trial court determines that any part of the proceeding should be closed to protect a minor child, the trial court remains free to make that determination. We hold that the trial court did not abuse its discretion in denying Plaintiff's motion to close the proceeding to the public, which included the media.

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Even assuming *arguendo* that the United States Supreme Court would hold that no qualified First Amendment right of public access applies to civil cases, *see Virmani*, 350 N.C. at 482, 515 S.E.2d at 697, we hold that Plaintiff has not shown that any of his federal constitutional rights have been violated by Judge Culler's first order. The trial court did not err by refusing to close the proceedings. We therefore affirm Judge Culler's first order. We note, however, that Judge Owens' order remains in effect, and the trial court must conduct the proceedings in a manner which will not run counter to Judge Owens' order. Upon remand, the trial court must determine how best to reconcile Judge Owens' order with Judge Culler's first order.

Affirmed in part, vacated in part and remanded.

Judges HUNTER, JR. and BEASLEY concur.

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STATE OF NORTH CAROLINA v. CLYDE MILTON BOYD, DEFENDANT

No. COA09-1666

(Filed 1 February 2011)

**1. Appeal and Error— preservation of issues—failure to object—waiver of assignment of error**

Defendant waived his assignment of error related to the admission of defendant's recorded video statement in a robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon case. Defendant failed to register an appropriate objection at trial to the introduction of the evidence.

**2. Evidence— admission of video—opened door to introduction—no plain error**

The admission of defendant's recorded video statement in a robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon case did not amount to plain error where defendant opened the door to the introduction of the video.

**3. Robbery— dangerous weapon—conspiracy—sufficient evidence**

The trial court did not err in denying defendant's motion to dismiss the charges of robbery with a dangerous weapon and

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conspiracy to commit robbery with a dangerous weapon because the State presented sufficient evidence of all elements of the crimes and of defendant's identity as the perpetrator.

**4. Constitutional Law—effective assistance of counsel—failure to object to evidence**

Defendant was not deprived of his Sixth Amendment right to counsel in a robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon case by virtue of his trial attorney's failure to object to the admission of defendant's recorded video statement. Defendant opened the door to the admission of this evidence by his testimony and the record demonstrated that the matters of which defendant complained were matters of trial strategy. Defendant's request that the trial court dismiss his claims for ineffective assistance of counsel without prejudice to defendant's right to reassert this claim in a motion for appropriate relief was denied.

Appeal by defendant from judgment entered 2 September 2009 by Judge Eric L. Levinson in Superior Court, Mecklenburg County. Heard in the Court of Appeals 18 August 2010.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Dahr Joseph Tanoury, for the State.*

*Brock, Payne & Meece, P.A. by C. Scott Holmes, for defendant-appellant.*

STROUD, Judge.

Clyde Milton Boyd ("defendant") appeals from his convictions for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. Defendant contends that the trial court erred in improperly admitting the video of defendant's interrogation by police; by not dismissing the case because there was insufficient evidence as a matter of law; and because he was deprived of his Sixth Amendment Right to Counsel by trial counsel's ineffective assistance in failing to object to the admission of defendant's recorded video statement. For the following reasons, we deny defendant's request for a new trial.

**I. BACKGROUND**

On 11 August 2008, defendant was indicted on one count of robbery with a dangerous weapon in violation of N.C. Gen. Stat.

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§ 14-87 and one count of common law conspiracy to commit robbery with a dangerous weapon. Defendant was tried on these charges on 31 August 2009. The State's evidence showed that, on 5 June 2008, Michael Eugene Taylor was robbed at gunpoint in the parking lot of his place of business when he returned from cashing payroll checks for his employees. Mr. Taylor pulled into the parking lot of his business and was blocked in by two men driving a green colored Lincoln automobile. The passenger, who was wearing a ski mask and carrying a gun, got out of the vehicle and confronted Mr. Taylor. The armed assailant told Mr. Taylor to give "him his F'ing money." After a verbal altercation, the assailant threatened to shoot Mr. Taylor. The assailant hesitated when Mr. Taylor told him he would have to shoot him to get the money. At the assailant's hesitation, a second man, the driver, hit Mr. Taylor and took the money from him. Both men then sped away in the Lincoln. Mr. Taylor attempted to chase the men in his pickup truck but was unable to catch up with them. In his statements both to the police and to his father on the day of the attack, Mr. Taylor identified defendant as his assailant, saying he recognized his voice. On 16 July 2008, Mr. Taylor was presented with a photographic lineup from which he picked out defendant, saying he was "95% sure" that defendant was the one who robbed him.

Mr. Taylor testified that he had known defendant for between twelve and fifteen years; that, during that time, he had conversed with defendant and become familiar with his voice; that he recognized defendant's voice as that of his assailant; and that he could see that the assailant was black, as was defendant, and had a lazy eye, as did defendant. According to Mr. Taylor's father, Mr. Taylor had not wavered in his certainty of his identification of defendant from the day of the attack until trial.

Defendant took the stand, denied any involvement in the robbery, and testified regarding his prior convictions as well as his interrogation by police. In addition, defendant presented evidence supporting any alibi. In rebuttal, the State introduced a digital video disk (DVD) of defendant's interrogation by police. Though defendant's trial counsel made objections to the questions being asked of one of the police officers who was present as the video played, she made no objection to the introduction of the DVD itself.

On 1 September 2009, defendant was convicted of both counts with which he was charged. Defendant was sentenced by the trial court to a consolidated term of 84-110 months imprisonment.

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Defendant appeals.<sup>1</sup>

**A. The Video Statement****II. ANALYSIS**

**[1]** Defendant first contends that his video statement should not have been admitted because it was prejudicial in that it contained testimony by one detective who was unavailable for trial; improper questioning of defendant regarding arrests and convictions more than ten years old; mischaracterizations of defendant's alibi witnesses and of their statements; and improper expressions of the detectives personal opinions. Defendant further asserts both that trial counsel objected to the introduction of the video statement and, alternately, that the admission of the video constitutes plain error. As to both assertions, we disagree and find no error in the video's admission.

**1. Objection to the Video Statement**

Objections to the admission of evidence must generally be preserved by an objection by counsel at the time of their admission. N.C. Gen. Stat. § 8C-1, Rule 103; N.C.R. App. P. 10(a)(1). Failure to object constitutes a waiver of any assignment of error on appeal related to the admission of evidence. *State v. Reid*, 322 N.C. 309, 312, 367 S.E.2d 672, 674 (1988). Though there are no particular requirements as to form under Rule 8C-1, there is a requirement that an objection must, "be timely and clearly present the objection or error to the trial court." *Id.* at 312, 367 S.E.2d at 674.

We note that three exchanges are relevant to the consideration of whether defendant registered an appropriate objection to the introduction of the video in question. The first exchange occurred between Ms. Macon, for the State, Ms. Tosi, for defendant, and the Court before the introduction of the video:

MS. MACON: Okay. Otherwise I would like to just play the whole thing and stop and start at certain points.

THE COURT: How long does it take?

MS. MACON: The tape is forty minutes long.

THE COURT: Ms. Tosi.

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1. We note that on, 9 June 2010, defendant filed a "Motion to Order the Clerk of Mecklenburg County to Transmit State's Exhibit 7 to the Court of Appeals." Since State's Exhibit 7 has been transmitted to this Court, we dismiss defendant's motion as moot.

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MS. TOSI: Your honor, I mean I guess I would agree that there are certain parts that I don't think are relevant that need to come out.

THE COURT: Has it already been adjusted? How does that work, do you have a transcript and you know ahead of time?

MS. MACON: Your Honor, there is not a transcript. I have gone through and taken note of the time exactly where to start and stop.

THE COURT: Let me say this, I probably will say something to the jury to help explain in my own way I think, you know, subject to your concerns. But I'll probably say something to the jury about why there are portions that are missing. But during that forty minutes I may step out. If it's, you know, if I need to be here--well I'll need to hear it too. If you both stipulate that the court reporter need not take it down--are you fine with that?

MS. TOSI: Yes, as long as she is actually introducing it; yes, sir.

THE COURT: Is that correct?

MS. MACON: Yes, sir.

THE COURT: We will mark it as an exhibit. You're on Number 7, is that correct?

MS. MACON: So we will mark it later as Number 7. That way the court reporter doesn't need to take down that portion if you stipulate for the record what was played and what was not played.

Defendant did not make any objection when the video was entered into evidence and actually agreed that it should be so admitted.

Defendant also claims that the two following exchanges register objections to the video. Both occurred while the video was being played during the State's rebuttal evidence, in response to the trial testimony of defendant regarding his interrogation. Detective Wilson, one of the detectives who had initially interrogated defendant, was testifying about the interrogation. In the first instance, defendant objected to the State's questioning regarding defendant's statements to the detective regarding defendant's whereabouts on the day of the crime and the detective's motivation for this line of questioning:

Q: Do you recall what he told you about where he was at and who he was with?

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A: He said he was at work. I believe that I asked him at some point if he knew the address of the house that he was at. He was not able to provide that to me. My thoughts were to go out if he gave me a specific location and see if the homeowner was there, if they were working on a house and they remembered him being there. I was never given or provided that information.

MS. TOSI: Your Honor, I'm going to OBJECT to this. We covered all this topic yesterday.

Likewise, in the second instance, defendant registered an objection to questions put to Detective Wilson regarding whether defendant had mentioned Shamika Smith, a witness for the defense, during his initial interrogation:

Q: Detective Wilson, at any point during the interview did the defendant mention to you a female by the name of Shamika Smith?

MS. TOSI: OBJECTION, Your Honor, to this; we covered this yesterday.

Both objections were made in response to specific questions to Detective Wilson during the playing of the DVD. Defendant proposes that defendant's counsel's objections are to the "way the detectives impeached Mr. Boyd rather than playing Mr. Boyd's statement" and "preserved this error for review for prejudicial error." But both objections included a specific basis for the objection, which was that the subject matter had already been "covered" the previous day. Neither objection addressed the supposed impeachment of defendant nor did they put the trial court on notice that defendant was attempting to object to the contents of the video. In fact, the objections were made to questions posed to Detective Wilson during his testimony, not to any of the statements on the video. Such objections do not "clearly present the objection or error to the trial court." *Reid*, 322 N.C. at 312, 367 S.E.2d at 674. Defendant's counsel made specific objections to particular questions regarding the examination of Detective Wilson and not to the video itself. Such objections do not inform the trial court that counsel is objecting to the presentation of the DVD and do not substitute for such objections. This interpretation of defendants objections is also consistent with defense counsel's later lack of objection to jury instructions regarding the consideration of the video as substantive evidence and reference to the video in order to illustrate defendant's demeanor during questioning.

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Accordingly, we find that no objection was entered to the introduction of the video evidence sufficient to preserve defendant's assignments of error.

## 2. Plain Error in Admission of Video Statement

**[2]** Defendant proposes that the admission of defendant's video statement constitutes plain error. A review of the entire record convinces us that this is not so.

Plain error serves as an exception to the aforementioned general requirement that a timely objection at trial is required to preserve an assignment of error for appeal. N.C.R. App. P. 10(a)(4). However, absent a timely objection at trial, the burden that an appellant faces in asserting the improper admission of evidence under the plain error standard is higher than that faced by an appellant who has preserved the issue by a proper objection. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). The North Carolina Supreme Court has admonished that the plain error rule is to be "applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . ." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and internal quotation marks omitted). For an appellate court to find plain error, it must first be convinced that, "absent the error, the jury would have reached a different verdict." *Reid*, 322 N.C. at 313, 367 S.E.2d. at 674. The burden of proving plain error falls on defendant. *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). However, plain error does not exist where even otherwise inadmissible evidence is admitted by the State in order to answer the previous testimony of defendant. *State v. Wilkerson*, 363 N.C. 382, 407, 683 S.E.2d 174, 190 (2009), *cert. denied*, — U.S. —, 176 L. Ed. 2d 734 (2010).

Certainly some of the evidence which was contained in defendant's interrogation video would normally be inadmissible. However, defendant opened the door to this evidence by his own testimony regarding his interrogation.

Under such circumstances, the law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof,

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even though such latter evidence would be incompetent or irrelevant had it been offered initially. *State v. Patterson*, 284 N.C. 190, 200 S.E.2d 16 (1973); *State v. Black*, 230 N.C. 448, 53 S.E.2d 443 (1949).

*State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). Defendant's own testimony addressed the subject matter of the video. In defendant's testimony, he opened the door to the introduction of the video by making reference to the content of his interview of 21 July 2008, his alibi, and his arrest. Even setting aside the substantive questions relating to the arrest and his earlier convictions, which passed without objection during his cross-examination, the questions by defendant's counsel on redirect regarding the demeanor of the officers and the circumstances of his statement opened the door to the admission of the tape. Defendant made copious use of the video to illustrate his case, even referring to the video in closing arguments to illustrate his demeanor during questioning. In this situation, we find no error, and therefore no plain error, in the video's admission.

**B. Motion to Dismiss**

[3] Defendant also contends that it was error for the trial court to deny his motion to dismiss either at the end of the State's case or at the end of the trial because the evidence presented was insufficient to warrant a conviction on either charge as a matter of law. We disagree.

Upon review of the trial court's denial of a defendant's motion to dismiss:

the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied . . . . In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both . . . . Once the court decides that a reasonable inference of guilt may be drawn from the circumstances, then, it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

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Both competent and incompetent evidence must be considered. In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. The defendant's evidence that does not conflict may be used to explain or clarify the evidence offered by the State. When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.

*State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455-56 (citations, quotation marks, and brackets omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Turnage*, 362 N.C. 491, 493, 666 S.E.2d 753, 755 (2008). We consider each of the charges against defendant in turn.

### 1. Robbery with a Dangerous Weapon

On appeal, defendant does not challenge that a robbery with a dangerous weapon occurred. Robbery with a dangerous weapon under N.C. Gen. Stat. § 14-87 is committed by:

[a]ny person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time either day or night, or who aids or abets any such person or persons in the commission of such crime . . .

N.C. Gen. Stat. § 14-87 (2007). Our Supreme Court has identified the essential elements of this crime as, "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened." *State v. Haselden*, 357 N.C. 1, 17, 577 S.E.2d 594, 605. The State presented evidence that Mr. Taylor had money stolen at gunpoint and that, during that interaction, his assailant threatened to shoot him, satisfying the essential elements of the crime.

Defendant challenges whether the State submitted substantial evidence as to defendant's identity as the perpetrator of the offense. We therefore examine the evidence as to defendant's identity. The evi-

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dence at trial showed, *inter alia* that: Mr. Taylor identified the voice of his assailant as that of defendant. Mr. Taylor was familiar with defendant's voice because he had known defendant for twelve to fifteen years. Mr. Taylor told his father immediately following the attack that he recognized the voice of defendant as that of his assailant. Mr. Taylor identified his assailant as being a black male with a lazy eye like that of defendant. In all of Mr. Taylor's statements to police and interactions with his family, he exhibited a consistently high level of certainty regarding his identification of defendant as his assailant.

Given the longstanding relationship between Mr. Taylor and defendant as well as the steadfastness and consistency of Mr. Taylor's identification of defendant, a "reasonable mind might accept as adequate," *Turnage*, 362 N.C. at 493, 666 S.E.2d at 755, Mr. Taylor's identification of defendant as Mr. Taylor's assailant. Because the State satisfied the legal standard for the presentation of substantial evidence that defendant was the perpetrator of the crime, defendant's motion to dismiss as to the charge of robbery with a dangerous weapon was properly denied.

## 2. Conspiracy to Commit Robbery with a Dangerous Weapon

Defendant likewise argues that the charge of conspiracy should have been dismissed. The State's successful assertion of a charge of criminal conspiracy requires proof of "an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. The State need not prove an express agreement. Evidence tending to establish a mutual, implied understanding will suffice to withstand a defendant's motion to dismiss." *State v. Wiggins*, 185 N.C. App. 376, 389, 648 S.E.2d 865, 874 (citations omitted), *disc. review denied*, 361 N.C. 703, 653 S.E.2d 160 (2007).

Taking all evidence in the light most favorable to the State, the State's evidence tended to show that defendant was driven by a second man to intercept Mr. Taylor. Defendant was wearing a ski mask and in possession of a gun. The second individual assaulted Mr. Taylor and took the money from Mr. Taylor when defendant hesitated in the commission of the robbery. The two men then got into the same car and drove away. Mr. Taylor's testimony regarding defendant and the driver of the Lincoln acting together to rob him in this way is "evidence tending to establish a mutual, implied understanding" between defendant and the driver to rob Mr. Taylor and did, therefore, properly "suffice to withstand [this] defendant's motion to dismiss." *Id.*

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Therefore, we find no error in the trial court's denial of defendant's motion to dismiss on the charge of conspiracy.

**C. Ineffective Assistance of Counsel**

[4] Finally, defendant argues that he was deprived of his Sixth Amendment right to counsel by virtue of his trial attorney's failure to object to the admission of his video statement. A claim of ineffective assistance of counsel, to be successful, requires proof: (1) "that the professional assistance that defendant received was unreasonable" and (2) "the trial would have had a different outcome in the absence of such assistance." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) (citations omitted).

Claims for ineffective assistance of counsel "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be brought without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *Id.* at 166, 557 S.E.2d at 525. Claims which are not properly asserted on direct appeal are properly dismissed without prejudice to defendant's right to reassert them during a subsequent proceeding on a motion for appropriate relief. *Id.* at 167, 557 S.E.2d at 526.

In the present case, the video statement in question was introduced in rebuttal because of the testimony of defendant. As discussed above, even if defendant's counsel had objected to admission of the video or to the various portions of testimony within the video which defendant argues should not have been admitted, the trial court would have properly overruled the objections because defendant had opened the door to this evidence by his testimony. Thus, defendant has not demonstrated that "the trial would have had a different outcome in the absence of such assistance." *Id.*

The record also demonstrates that the matters of which defendant complains were matters of trial strategy. Defendant's decision to testify and the content of that testimony led to the admission of the evidence which is the subject of defendant's arguments for ineffective assistance of counsel. Defendant has not argued that his counsel failed to advise him properly regarding his right to remain silent, that he did not understand the ramifications of his decision to testify, or that his trial counsel improperly presented his defense. Defendant's decision to testify, the defenses he asserted, and the manner in which he asserted them were matters of trial strategy, and "[d]ecisions

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concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by this Court.” *State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002). Defendant’s counsel’s trial strategy is clearly outlined in her closing argument. Defendant’s reason for his decision to testify was to establish his alibi defense; defendant claimed that he was at work on the day when the robbery occurred, and defendant’s counsel “brought in everyone that I thought that you would need to walk [defendant] though his day and to explain where he was.” Defendant’s counsel also stressed the fact that defendant had emphatically denied robbing Mr. Taylor ever since he was first questioned, including references to defendant’s videotaped interview. As the jury did not believe defendant’s alibi evidence, defendant may in hindsight now question this trial strategy, but he has not challenged it on appeal and he has failed to overcome the presumption that his counsel’s trial strategy was “within the boundaries of acceptable professional conduct.” *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (“Moreover, this Court engages in a presumption that trial counsel’s representation is within the boundaries of acceptable professional conduct.”) As the United States Supreme Court has stated,

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance . . . .

*Strickland v. Washington*, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 694 (1984). Therefore, defendant has failed to demonstrate ineffective assistance of counsel based upon the record before us.

Defendant requests in the alternative that we dismiss his claims for ineffective assistance of counsel without prejudice to defendant’s right to reassert this claim in a motion for appropriate relief because the record on appeal is insufficient for us to make this determination. See *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001). However, defendant has failed to make any argument as to what sort of evidentiary record may be needed to make this determination or how the record before us is deficient. All of defendant’s arguments as to ineffective assistance of counsel are based upon his counsel’s

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failure to object to the videotape of his interview or to particular evidence in the interview; all of the information is in the record before us. Based upon defendant's asserted grounds for his claim of ineffective assistance of counsel, we see no need for additional proceedings before the trial court. Therefore, defendant's claim for ineffective assistance of counsel is without merit.

**III. CONCLUSION**

For the foregoing reasons, we hold that the trial court committed no error as to the admission of the video evidence complained of and no error as to the denial of defendant's motions to dismiss. Defendant's claim for ineffective assistance of counsel is without merit and is dismissed.

NO ERROR.

Judges McGEE and ERVIN concur.



CHARLES K. SAPP, NANCY SAPP, HENRY KEITH MILLER, JR., FOREST BRENT SLOOP, LORI A. SLOOP, RICHARD L. WHELPLEY, LOKEEL M. WHELPLEY, ETHEL P. SMITH, DOUGLAS JOHN BUTLER, PEGGY S. BOOSE, WILLIAM E. GARRETT, JR., CATHY S. HARPER, KENNETH J. HARPER, KEITH MILLER, SR., AND BETTY MILLER, PLAINTIFFS, v. YADKIN COUNTY, YADKIN COUNTY PLANNING BOARD AND YADKIN COUNTY BOARD OF ADJUSTMENT, DEFENDANTS

No. COA09-1725

(Filed 1 February 2011)

**1. Discovery— time—local rules**

The trial court did not err by granting plaintiffs' motion to continue discovery for only 45 days instead of 120. The local rule allowing 120 days for completion of discovery does not entitle a party to a mandatory 120 day period.

**2. Discovery— hearing date—sufficient time allowed—discovery not closed**

Plaintiffs were not prevented from utilizing any necessary discovery procedures by a continuance of discovery for only 45 days. Plaintiffs' conduct following the continuance belied the

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need for additional time; furthermore, setting a date for the summary judgment hearing did not close the discovery period.

**3. Judges—recusal denied—no personal interest or preference**

The trial court did not err by denying a motion to recuse where the case involved rezoning for a new jail and the judge had previously issued show cause orders involving jail conditions and the construction of a new jail “with all deliberate speed.” There was nothing to indicate that the judge’s desire for a prompt resolution of the jail issue was personal or that he had any preference or opinion on the location of the new jail.

**4. Zoning—statement of consistency—supplied to Commissioners—not required to be in minutes**

The Planning Board met the requirements of N.C.G.S. § 153A-341 and a Yadkin County zoning ordinance by providing a written recommendation to the Board of Commissioners addressing zoning consistency. There was nothing in the statutes or ordinance requiring a statement of consistency in the Planning Board minutes.

**5. Zoning—consistency and policy guidelines—no secrecy or impropriety**

There was no genuine issue of fact regarding any secrecy or impropriety surrounding a rezoning where, regardless of the contents of the Planning Board minutes, the recommendation received at the Planning office by plaintiff Boose contained both a statement of consistency and a discussion indicating that the proposed zoning amendment met the policy guidelines in the ordinance. Moreover, a member of the Planning Board informed the Board of Commissioners of the recommendation and read the statement of consistency.

**6. Zoning—conditional use—correctional facility**

The trial court did not err by granting summary judgment for defendants in a case involving a rezoning for a new jail. Plaintiffs pointed to an ordinance provision regarding proximity of correctional facilities to residential properties, but that provision was not applicable.

Appeal by Plaintiffs from orders entered 17 April 2009, 8 May 2009, and 2 July 2009 by Judges Edwin G. Wilson, Jr., A. Moses

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Massey, and John O. Craig, III, respectively, in Yadkin County Superior Court. Heard in the Court of Appeals 18 August 2010.

*Randolph and Fischer, by J. Clark Fischer, and Melvin & Powell, by Edward L. Powell, for Plaintiffs.*

*James L. Graham and Bell, Davis & Pitt, P.A., by Michael D. Phillips, for Defendants.*

STEPHENS, Judge.

*Factual and Procedural History*

In 2004, the Yadkin County Board of Commissioners (“Board of Commissioners”) acquired a roughly ten-acre parcel of land known as the “Hoots Road site.” In August 2008, the Board of Commissioners designated the Hoots Road site as the location for a new county jail.

On 13 August 2008, the Yadkin County Administration, through the Yadkin Interim County Manager, filed a Petition for Zoning Amendment (“Petition”), seeking to have the Hoots Road site rezoned from Highway Business to Manufacturing-Industrial One: Conditional. At their 8 September 2008 meeting, the Yadkin County Planning Board (“Planning Board”) reviewed the Petition and recommended approval of the proposed rezoning to the Board of Commissioners.

At their 15 September 2008 meeting, the Board of Commissioners received the Planning Board’s recommendation and scheduled a public hearing on the proposed rezoning of the Hoots Road site for 20 October 2008. Following the public hearing, the Board of Commissioners voted to approve the rezoning of the Hoots Road site for construction of the new jail.

On 29 December 2008, Plaintiffs filed their complaint against Defendant Yadkin County; the complaint was later amended to include the Planning Board and the Yadkin County Board of Adjustment as Defendants On 28 January 2009, Defendants filed a motion to dismiss Plaintiffs’ complaint, which was granted by Judge Edwin G. Wilson, Jr. as to all claims in the complaint except Plaintiffs’ claim for a declaratory judgment that the rezoning of the Hoots Road site violated the applicable zoning laws and ordinances.

On 13 April 2009, Defendants filed a motion for summary judgment on Plaintiffs’ remaining claim and noticed hearing on the motion for 27 April 2009. On 16 April 2009, Plaintiffs filed a motion to continue

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the summary judgment hearing. In an order filed 8 May 2009, Judge A. Moses Massey granted Plaintiffs' motion and ordered that the summary judgment hearing be continued until 15 June 2009.

On 10 June 2009, Plaintiffs filed a cross-motion for summary judgment, as well as a motion for recusal of Judge John O. Craig, III, the judge assigned to hear the motions for summary judgment. The basis for Plaintiffs' motion to recuse was that Judge Craig's alleged extensive prior involvement in the Yadkin County jail issue made it inappropriate for him to decide the question of summary judgment.

Following the hearing on the motions, Judge Craig issued the 2 July 2009 orders denying Plaintiffs' motion to recuse and granting Defendants' motion for summary judgment. From this order, as well as Judge Massey's order continuing the hearing on Defendants' summary judgment motion and Judge Wilson's order partially granting Defendants' motion to dismiss, Plaintiffs appeal.<sup>1</sup>

*Discussion<sup>2</sup>**I. Plaintiffs' motion to continue*

[1] Plaintiffs' Rule 56(f) motion to continue the summary judgment hearing was granted on 27 April 2009, and the hearing date was continued until 15 June 2009. On appeal, Plaintiffs argue that the "45-day period allotted by [the trial court] was insufficient, given the need to develop facts necessary to support their opposition to the [summary judgment] [m]otion."<sup>3</sup>

"Motions to continue pursuant to Rules 56(f) and 40(b) of our Rules of Civil Procedure are granted in the trial court's discretion." *Caswell Realty Assocs. I, L.P. v. Andrews Co.*, 128 N.C. App. 716, 721, 496 S.E.2d 607, 611 (1998).

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1. On appeal, Plaintiffs fail to argue any grounds for appeal of Judge Wilson's order partially granting Defendants' motion to dismiss. Accordingly, Plaintiffs' appeal of this order is taken as abandoned. *See* N.C. R. App. P. 28(b)(6) (2009).

2. The citations to the record page numbers in Plaintiffs' assignments of error are incorrect. However, this failure is not sufficient to warrant dismissal of this appeal based on failure to comply with the Rules of Appellate Procedure. *Davis v. Macon Cty. Bd. of Educ.*, 178 N.C. App. 646, 650, 632 S.E.2d 590, 593, *disc. review denied*, 360 N.C. 645, 638 S.E.2d 465 (2006).

3. Although Plaintiffs' motion was granted in open court on 27 April 2009, Plaintiffs begin their calculation of the continuance period on the date the trial court signed its order: 1 May 2009.

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Plaintiffs argue that they were entitled to a 120-day discovery period<sup>4</sup> following the last pleading based on their interpretation of Local Court Rule 4.1 for Superior Civil Cases, Judicial District 23, which provides that

[d]iscovery shall begin promptly . . . For all cases except those which have previously been dismissed and refiled pursuant to Rule 41, N.C.R.Civ.P., discovery should be scheduled so as to be completed within 120 days of the last required pleading.

Case Management Plan and Local Court Rules for Superior Civil Cases Judicial District 23, Rule 4.1 (enacted January 2008).

As noted by Defendants, Local Rule 4.1 clearly establishes no more than a presumptive 120-day maximum time within which discovery is to be completed, and does not entitle a party to a mandatory 120-day discovery period. Plaintiffs' interpretation of Local Rule 4.1 is untenable and, therefore, Plaintiffs' argument that the trial court abused its discretion by not allowing Plaintiffs the time to complete discovery granted them by the applicable local rule is without merit.

**[2]** Plaintiffs further argue that the "45-day period" was insufficient under North Carolina Rule of Civil Procedure 26(d), which provides as follows:

Any order or rule of court setting the time within which discovery must be completed shall be construed to fix the date after which the pendency of discovery will not be allowed to delay trial or any other proceeding before the court, but shall not be construed to prevent any party from utilizing any procedures afforded under [the Rules], so long as trial or any hearing before the court is not thereby delayed.

N.C. Gen. Stat. § 1A-1, Rule 26(d) (2009). Plaintiffs contend that because "additional time was required in order to schedule and prepare interrogatories and depositions" before the hearing, the court's 45-day continuance violated Rule 26(d) by preventing Plaintiffs from utilizing discovery procedures. We are unpersuaded.

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4. In their motion to continue, Plaintiffs prayed for a 150-day continuance. However, at the hearing on the motion, Plaintiffs requested the hearing be continued for 120 days following the last pleading filed in the case, which was Defendants' 13 April 2009 answer. Because Plaintiffs only address the issue of whether the court abused its discretion in not granting the 120-day continuance, we, too, only address that issue.

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Firstly, we note that Plaintiffs' contention that they required additional time is belied by their conduct following the 27 April 2009 continuance: after the continuance was granted, Plaintiffs served Defendants with written discovery requests, to which Defendants responded on 8 June 2009; Plaintiffs requested no other discovery from Defendants and did not file any motions to compel discovery or to continue the 15 June 2009 hearing; and Plaintiffs filed their own cross-motion for summary judgment on 10 June 2009. From the fact that Plaintiffs sought no additional discovery, and the fact that Plaintiffs filed their own summary judgment motion prior to the hearing, it appears Plaintiffs did not require additional time to complete discovery.

Furthermore, Plaintiffs' argument appears to be based on the erroneous assumption that, by setting a date for the summary judgment hearing, the trial court was issuing an order "setting the time within which discovery must be completed" under Rule 26(d). Although a hearing on a motion for summary judgment may result in the limitation of additional discovery—by determining which facts are genuinely disputed and limiting further discovery to only those facts—such a hearing does not close the discovery period, and, therefore, cannot be considered "the time within which discovery must be completed." A summary judgment hearing is not required to take place upon completion of all factual discovery, and any argument that an order setting a date for a summary judgment hearing violates Rule 26(d) is clearly erroneous.

Based on the foregoing, we conclude that Plaintiffs were not prevented from utilizing any necessary discovery procedures. Accordingly, Plaintiffs' argument is overruled.

*II. Plaintiffs' motion to recuse*

[3] Plaintiffs next argue that the trial court erred by denying their motion for recusal of Judge Craig.

When a party requests such a recusal by the trial court, the party must demonstrate objectively that grounds for disqualification actually exist. The requesting party has the burden of showing through substantial evidence that the judge has such a personal bias, prejudice or interest that he would be unable to rule impartially.

*In re Faircloth*, 153 N.C. App. 565, 570, 571 S.E.2d 65, 69 (2002) (internal citations and quotation marks omitted).

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Plaintiffs' claim of bias and prejudice is based on two Orders to Show Cause entered by Judge Craig on 21 November 2006 and 5 May 2008. In the first order, Judge Craig ordered the Board of Commissioners to "show cause why a Writ of Mandamus should not issue against you in light of your apparent failure to perform your inherent constitutional as well as statutory duties pertaining to the Yadkin County jail facility." In the second order, Judge Craig retained for the Court "jurisdiction over this matter, in order to ensure that the County of Yadkin moves forward, with all deliberate speed, with the construction of a new jail that meets the standards imposed by the laws of this State." The second order further indicated that "[t]his Order to Show Cause shall be continued from Term to Term, in the event that the Court deems it necessary to take appropriate action."

Plaintiffs argue that Judge Craig's orders make it clear "that [Judge Craig] had a direct interest in the prompt resolution of the jail issue" that was "in unavoidable opposition to the Plaintiffs' claims which, if found meritorious, would have the necessary effect of delaying new jail construction until any rezoning was completed in a lawful manner." Plaintiffs' argument is without merit.

Although the orders plausibly show that Judge Craig desired a prompt resolution of the jail issue, there is nothing to indicate that this desire was personal, or that it necessitated Judge Craig's disqualification based on an inability to rule impartially. Judge Craig's attempt to ensure that the construction moved forward "with all deliberate speed" can hardly be interpreted as an attempt by Judge Craig to have the jail built without any delay and without regard for the requirements of "laws of the State." *Cf. Watson v. Memphis*, 373 U.S. 526, 530, 10 L. Ed. 2d 529, 534 (1963) (noting that the concept of "deliberate speed" countenanced indefinite delay in elimination of racial barriers in schools). Most importantly, in the context of this case, the orders evince no evidence that Judge Craig had any preference or opinion on the location of the new jail. Accordingly, we conclude that the orders do not contain substantial evidence of Judge Craig's alleged impartiality. Plaintiffs' argument is overruled.

*III. Defendants' motion for summary judgment*

Plaintiffs next argue that the trial court erred by granting summary judgment in favor of Defendants We review a trial court's grant of summary judgment *de novo*. *Childress v. Yadkin County*, 186 N.C. App. 30, 34, 650 S.E.2d 55, 59 (2007).

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Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a party is entitled to a judgment as a matter of law. Evidence presented by the parties is viewed in the light most favorable to the non-movant.

*Id.* (internal citations, brackets, and quotation marks omitted).

Plaintiffs claim to have offered substantial evidence of three violations of the procedural and substantive requirements of the Yadkin County zoning scheme such that summary judgment for Defendants was improper. We discuss the three alleged violations set forth by Plaintiffs separately.

*A. Improper recommendation to the Board of Commissioners*

[4] Plaintiffs first contend that, in violation of N.C. Gen. Stat. § 153A-341 and the Yadkin County Zoning Ordinance (“Ordinance”), the Planning Board failed to include in its recommendation to the Board of Commissioners “a statement of zoning consistency.” As evidence of this failure, Plaintiffs presented an affidavit by Plaintiff Peggy Boose (“Boose”), which states that on 2 October 2008, Boose obtained from the Planning Department a copy of the minutes of the Planning Board’s 8 September 2008 meeting. Boose’s affidavit further alleges that on 20 October 2008, Boose obtained another copy of the Planning Board’s 8 September 2008 minutes from the County Manager of Yadkin County, which contained both a discussion of the policy guidelines and a “statement of zoning consistency,” neither of which were in the minutes obtained by Boose on 2 October 2008. Plaintiffs cite this “discrepancy in the Planning Board minutes” as evidence of Defendants’ violation of the applicable statutes and ordinances.

Under N.C. Gen. Stat. § 153A-341,

[t]he planning board shall advise and comment on whether [a] proposed [zoning] amendment is consistent with any comprehensive plan that has been adopted and any other officially adopted plan that is applicable. The planning board *shall provide a written recommendation to the board of county commissioners that addresses plan consistency and other matters as deemed appropriate by the planning board, but a comment by the planning board that a proposed amendment is inconsistent with the*

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*comprehensive plan shall not preclude consideration or approval of the proposed amendment by the governing board.*

N.C. Gen. Stat. § 153A-341 (2007) (emphasis added).

The Ordinance provides that “[p]ursuant to NC G.S. 153A-341, the Planning Board shall include, in its written recommendation and report to the Board of County Commissioners, comments on the consistency of the proposed change with the Land Use Plan[.]” Further, the Planning Board shall “transmit its recommendation and report . . . to the Board of County Commissioners.”

In compliance with the Ordinance, the Planning Board rendered its decision on the Petition at its 8 September 2008 meeting. Further, according to the Notice of Meeting for the 20 October 2008 meeting of the Board of Commissioners, the written recommendation by the Planning Board was received by the Board of Commissioners by at least 17 October 2008. Clearly, then, the Planning Board met the requirements of section 153A-341 by providing “a written recommendation to the board of county commissioners that addresses plan consistency,” and met the requirements of the Ordinance by transmitting its recommendation and report to the Board of Commissioners. Based on the foregoing, we conclude the actions of the Planning Board did not violate section 153A-341 or the Ordinance.

Although Plaintiffs’ evidence presents an issue as to the contents of the minutes as filed with the Planning Department, there is nothing in the statutes or Ordinance requiring the Planning Board to file a “statement of zoning consistency” with its minutes at the Planning Department office. Accordingly, Plaintiffs’ argument presents no genuine issue of material fact.

*B. Secretive and improper method of rezoning*

[5] Plaintiffs next argue that the evidence sufficiently supported their allegation that the rezoning was “secretive and improper” such that a full hearing on the merits was required. The only support Plaintiffs offer for this argument is the “undisputed reality that the Planning Board published two separate and wildly differing minutes of its September 8 meeting[.]” Based on our review of the Ordinance, the evidence presented by Plaintiffs does not raise a genuine issue of material fact regarding any secrecy or impropriety surrounding the Planning Board’s recommendation.

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The Ordinance requires that a proposed zoning amendment meet the policy guidelines set out in the Ordinance before the amendment can receive favorable recommendation. As discussed *supra*, the Planning Board must transmit its recommendation, along with a statement of zoning consistency, to the Board of Commissioners.

Regardless of the contents of the minutes obtained by Boose at the Planning Department office, the recommendation received by the Board of Commissioners contained both a statement of consistency and a discussion indicating that the proposed amendment met the policy guidelines in the Ordinance.

Further, the record indicates that at the 15 September 2008 meeting of the Board of Commissioners, 17 days before Boose obtained the first set of minutes, a member of the Planning Board informed the Board of Commissioners of the recommendation and read the statement of zoning consistency from the Planning Board. Accordingly, Plaintiffs' contention that a missing portion of the minutes at the Planning Department office indicates that the Planning Board failed to consider the policy guidelines and the amendment's consistency, or that the Planning Board added the missing portion surreptitiously after their initial meeting, is untenable. Plaintiffs' argument is overruled.

*C. Improper approval of a correctional facility within one mile of residential property*

[6] Plaintiffs lastly argue that summary judgment was improper because the rezoning violates Article 17 of the Ordinance, which provides that “[n]o correctional facility shall be permitted to locate or expand within a one (1) mile radius of any property used for residential purposes[.]”

As Defendants correctly point out, Article 17, which governs “Conditional Uses,” is not applicable in this case. As the minutes of the Board of Commissioners’ 20 October 2008 meeting indicate, this matter is governed by Article 16, “Parallel Conditional Districts and the Conditional Rezoning Process.”<sup>5</sup> Section 1 of Article 16 provides as follows:

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5. Further, the process outlined in Article 17 involves application for a permit granted by the Yadkin County Board of Adjustment. Although the Board of Adjustment is a named Defendant, other than in the caption, there is no mention of the Board of Adjustment in the record, transcript, or briefs. In this case, Defendants sought to rezone the Hoots Road site by application to the Board of Commissioners and the Planning Board and by following the procedures outlined in Article 16.

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In the event that an application for the reclassification of property to a parallel conditional district seeks the approval of a use normally allowed as a conditional use in the corresponding general use district: Approval of the application by the Board of Commissioners solely in accordance with the provisions of this Article shall be deemed sufficient to allow such use of the property, and *it will not be necessary for the applicant or the property owner to obtain a conditional use or other compliance permit, or to meet the conditions prescribed by other Articles of this Ordinance.*

In this case, the application seeks the Board of Commissioners' approval to use the Hoots Road site as a correctional facility, which is a conditional use normally allowed in the corresponding general use district (*i.e.*, Manufacturing-Industrial One). Accordingly, it is not necessary for Defendants to meet the conditions prescribed by the other articles of the Ordinance, specifically Article 17. Plaintiffs' argument is without merit.

Based on the foregoing, we hold that the trial court did not err by granting Defendants' motion for summary judgment, by denying Plaintiffs' motion to recuse, or by granting Plaintiffs' motion to continue. The orders of the trial court are

AFFIRMED.

Judges Robert C. HUNTER and Robert N. HUNTER, JR. concur.

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[209 N.C. App. 441 (2011)]

STATE OF NORTH CAROLINA v. RAYTHEON WILLIAMS

No. COA10-571

(Filed 1 February 2011)

**1. Confessions and Incriminating Statements—interrogation of juvenile defendant—initial invocation of rights—defendant initiated further conversation**

The trial court did not err by denying defendant's motion to suppress his incriminating statement to police officers because the statement was not obtained in violation of N.C.G.S. § 7B-2101. Although defendant initially invoked his right to have his mother present during his custodial interrogation, the evidence showed that defendant himself thereafter initiated further communication with the investigating officers.

**2. Constitutional Law— Fifth Amendment right against self-incrimination—Sixth Amendment right to counsel—no violation**

The trial court did not err by denying defendant's motion to suppress his incriminating statement to police officers where the statement was not obtained in violation of his Fifth or Sixth Amendment rights. Case law cited in defendant's brief involving "the utilization of coercive techniques" and "overbearing interrogation tactics" was not applicable in this case and, because defendant had not been formally charged with the robbery and murder at issue when detectives questioned him about those crimes, defendant's Sixth Amendment right to counsel had not yet attached when he was questioned by the detectives.

Appeal by defendant from judgments entered 20 November 2009 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 1 November 2010.

*Roy Cooper, Attorney General, by LaToya B. Powell, Assistant Attorney General, for the State.*

*Mary March Exum, for defendant-appellant.*

MARTIN, Chief Judge.

Defendant Raytheon Williams appeals from judgments entered upon jury verdicts finding him guilty of first-degree murder in

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violation of N.C.G.S. § 14-17, robbery with a firearm in violation of N.C.G.S. § 14-87, and conspiracy to commit robbery with a firearm in violation of N.C.G.S. § 14-2.4(a). We find no error.

The evidence tended to show that, on 24 January 2007, during the course of their investigation into the 25 November 2006 murder of Satwinder Singh at the Aman Mini Mart in Greensboro, North Carolina, Detectives Mike Matthews and Leslie Holder with the Homicide Squad of the Greensboro Police Department interviewed the seventeen-year-old defendant, who was in the Guilford County jail on unrelated charges. The detectives had defendant brought to an interview room in the Criminal Investigations Division at the jail to talk with him. After explaining that they were there to investigate a murder and robbery at the Aman Mini Mart, Detective Matthews asked defendant “some basic questions” about his education and verified that he was not under the influence of any impairing substances. Detective Matthews then read defendant the following from the Greensboro Police Department “Statement of Rights (For Juveniles up to Age 18)” form:

Before asking you any questions, we want to advise you of your rights and determine that you understand fully what your rights are.

1. You have the right to remain silent.
2. Whatever you say can and will be used as evidence against you in a court or law.
3. You have a right to talk with a lawyer and to have a lawyer present with you while you are being questioned. If you do not have a lawyer and want one, a lawyer will be appointed for you.
4. You have a right to have a parent, guardian, or custodian present during questioning.
5. You may decide now or at any later time to exercise the above rights and not answer any questions or make any statement.

Detective Matthews also reviewed with defendant the “Waiver of Rights (For Juveniles Age 14 to 18)” section of this form, which provides:

I have read the above statement of my rights and have also had my rights explained to me by a police officer. Knowing these rights, I do not want a lawyer, parent, guardian or custodian pres-

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ent at this time. I waive each of these rights knowingly and willingly agree to answer questions and/or make a statement.

According to the detectives, defendant acknowledged that he understood the rights as they had been read to him by signing the "Statement of Rights" section of the form. Defendant then requested to speak with his mother. Upon hearing defendant's request, Detectives Matthews and Holder ended the interview, indicated defendant's request on the "Waiver of Rights" section of the form as "Parent Requested—Gloria Gant," and exited the interview room.

For the next ten minutes or so, the detectives reviewed the information in the case file to determine how to contact defendant's mother. Since, according to the detectives, the case file contained "conflicting information" regarding where defendant's mother lived, the detectives re-entered the interview room for the limited purpose of asking defendant "how [they] could get in touch with his mother." Both detectives testified on voir dire that no other questions were asked of defendant at this time.

Defendant gave the detectives his mother's current residential address and advised that the detectives would "have to call several people to get in touch with her" because she did not have a phone. Defendant then asked Detective Matthews "when [he] was going to talk to him about the robbery and the murder at the convenience store on Church Street." Detective Matthews explained that he could not speak with defendant about that incident because defendant had stated that he wanted his mother present for any such questioning. Defendant then told Detective Matthews that the detective "misunderstood" him, and that defendant only wanted his mother present for questions related to the charges for which he was currently in jail, but said specifically that he "*did not want her present* when he talked to [Detective Matthews] about the robbery and the man getting killed." (Emphasis added.) Detective Matthews asked defendant if he was sure, and defendant indicated that he was. Detective Matthews advised defendant that he "would give him a few minutes and would be back in to talk to [defendant] if he still wanted to talk," at which point the detectives left the room once again.

A few minutes later, the detectives re-entered the interview room, and Detective Matthews asked defendant if he still wanted to speak with him without his mother present. Defendant stated that he did. Detective Matthews again read defendant his rights using a second, unmarked copy of the Greensboro Police Department "Statement of

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Rights (For Juveniles up to Age 18)" form as his guide. Defendant signed this second form, again indicating that he understood the rights as they were administered to him by Detective Matthews. This time, defendant also signed the "Waiver of Rights (For Juveniles Age 14 to 18)" section of this form, indicating his decision to waive these rights. After signing the second form waiving his rights, defendant gave a statement implicating himself in the 25 November 2006 robbery and murder at the Aman Mini Mart. No portion of the interview was recorded.

Defendant moved to suppress his incriminating statement. The trial court denied the motion to suppress. Following a trial, a jury returned verdicts finding defendant guilty of first-degree murder, robbery with a firearm, and conspiracy to commit robbery with a firearm. Defendant appeals from judgments entered upon the verdicts sentencing him to life imprisonment without the possibility of parole for first-degree murder and a consecutive term of 64 to 84 months imprisonment for the other offenses.

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**[1]** Defendant first contends the trial court erred by denying his motion to suppress his incriminating statement because it was obtained in violation of N.C.G.S. § 7B-2101. We disagree.

N.C.G.S. § 7B-2101(a)(3) provides that "[a]ny juvenile in custody must be advised prior to questioning . . . [t]hat the juvenile has a right to have a parent, guardian, or custodian present during questioning." N.C. Gen. Stat. § 7B-2101(a)(3) (2009). "If the juvenile indicates in any manner and at any stage of questioning pursuant to this section that the juvenile does not wish to be questioned further, the officer shall cease questioning." N.C. Gen. Stat. § 7B-2101(c). Thus, once a juvenile defendant "has requested the presence of a parent, or any one of the parties listed in the statute, defendant may not be interrogated further until [counsel, parent, guardian, or custodian] has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police.*" *State v. Branham*, 153 N.C. App. 91, 95, 569 S.E.2d 24, 27 (2002) (emphasis added) (alteration in original) (internal quotation marks omitted). "To determine whether the interrogation has violated defendant's rights, we review the findings and conclusions of the trial court." *Id.*

In the present case, the parties do not dispute, and the evidence supports, the trial court's findings that defendant was a seventeen-year-old juvenile and was already in custody at the time he was

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brought to the interview room at the jail for questioning. The parties further agree, and the evidence supports, that defendant initially invoked his right to have his mother present during questioning and that the detectives ceased all questioning and left the interrogation room after defendant invoked this right in accordance with N.C.G.S. § 7B-2101. At issue, then, is whether the evidence supports the trial court's findings and conclusions that defendant "initiated the conversation the second time, and thereafter he waived [his] right [under N.C.G.S. § 7B-2101] knowingly, voluntarily, and willingly."

The court made extensive findings of fact based on the evidence recounted above, including the following:

That after about 10 minutes[, during which time the detectives searched the case file for information about how to contact defendant's mother but could not determine how to do so,] Detective Matthews and Detective Holder went back into the—re-entered the interview room or went back into the interview room and asked—and Detective Matthews asked the defendant how to get in touch with his mother.

The defendant advised or told Mister—Detective Matthews that Mr. Williams' mother does not have a phone, that he would have to call several people, that Detective Matthews would have to call several people to get in touch with her. He told—Mr. Williams told Detective Matthews that his mom stayed at 703 Holt Avenue, that the defendant, Mr. Williams, then asked Mister—Detective Matthews when I was going to talk to him about the robbery and murder at the convenience store on Church Street; that Detective Matthews responded or answered, I could not talk to him about that because he had requested his mother, that Mr. Williams had requested his mother.

The defendant, Mr. Williams, then said that he misunderstood him, that—that Mr. Matthews misunderstood him and that Mr. Williams just wanted to talk to his mother about the breaking and entering charges and getting out of jail. Mr. Williams said that he did not want his mother present when he talked about the robbery and the man getting killed.

Detective Matthews asked him if he was sure that he wanted to talk to him about this subject robbery and the man getting killed and the defendant—meaning the robbery and the man getting killed—and the defendant said he was sure. Detective Matthews told him he would leave the room to let him think about this and

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would come back in a few minutes, and Detective Matthews and Detective Holder left the room.

Detective Matthews, before leaving the room, told the defendant that he'd let him talk to us if he still wanted to talk to us after a few minutes; that Detective Holder and Detective Matthews left the room, stayed out of the room for approximately four or five minutes; that at about 6:10 p.m. the two detectives went back into the room, that Detective Matthews asked the defendant if he still wanted to speak to him without his mother present, the defendant stated he did.

. . . .

That they went back into the room [after leaving when defendant initially requested the presence of his mother before further questioning], that the defendant stated he wanted to talk about the robbery and murder; that Detective Matthews did—when they re-entered the room, that Detective Matthews did not make any statements to the defendant concerning the murder or robbery at the convenience store; that Detective Matthews did not—when they—when they re-entered the room Detective Matthews did not tell the defendant concerning any statements of the codefendant or anything implicating Mr. Williams or otherwise.

Although defendant initially invoked his right to have his mother present during his custodial interrogation in accordance with N.C.G.S. § 7B-2101(a)(3), the evidence showed that defendant himself thereafter initiated further communication with the investigating detectives. Such communication was not the result of any further interrogation by the detectives. Instead, the evidence shows that defendant told the detectives that they "misunderstood" him when he requested the presence of his mother for further questioning, because defendant only wanted his mother present for questioning related to the charges for which he was already in custody. Defendant specifically told the detectives that he did not want his mother present during any questioning related to the robbery and murder at the Aman Mini Mart. Therefore, we conclude the evidence supports the trial court's findings, which in turn support its determination that defendant's incriminating statement was not elicited in violation of N.C.G.S. § 7B-2101, because "defendant voluntarily, knowingly waived his rights, including the right to have an attorney present . . . and the right to have a parent, guardian, and custodian present."

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[2] Defendant also contends the trial court erred by denying his motion to suppress because he suggests his incriminating statement was obtained in violation of his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel. With respect to the Fifth Amendment, defendant cites case law involving “the utilization of coercive techniques” and “overbearing interrogation tactics,” but fails to indicate how these or any of the other cases upon which he relies in this section of his brief are applicable to the case before us. With respect to the Sixth Amendment right to counsel, such a right is “offense-specific,” *see State v. Strobel*, 164 N.C. App. 310, 318, 596 S.E.2d 249, 255 (2004), *appeal dismissed and disc. review denied*, 359 N.C. 286, 610 S.E.2d 712, *cert. denied*, 545 U.S. 1140, 162 L. Ed. 2d 889 (2005), and “attaches only ‘at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information or arraignment.’” *State v. Lippard*, 152 N.C. App. 564, 569, 568 S.E.2d 657, 661 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 32 L. Ed. 2d 411, 417 (1972)), *appeal dismissed, disc. review denied, and cert. denied*, 356 N.C. 441, 573 S.E.2d 159 (2002). “[W]ithout any attachment of the Sixth Amendment right to counsel, a suspect is free to waive the rights available to him under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), and its progeny.” *Id.* at 570, 568 S.E.2d at 661-62 (internal quotation marks omitted). Since defendant concedes that he had not been formally charged with the Aman Mini Mart robbery and murder when detectives questioned him about those crimes, and admits that he was in custody only “after having been arrested on charges unrelated to this case,” (emphasis added), we conclude that defendant’s Sixth Amendment right to counsel had not yet attached when he was questioned by the detectives. Accordingly, we decline defendant’s invitation to “look beyond the caselaw as it is, and to view this as an issue of first impression,” and overrule these issues on appeal.

Finally, defendant contends the trial court erred by denying his motion to suppress because his interrogation was not electronically recorded in compliance with N.C.G.S. § 15A-211. However, defendant concedes that N.C.G.S. § 15A-211 is only applicable to interrogations occurring on or after 1 March 2008, *see* 2007 Sess. Laws 1282, 1284, ch. 434, § 2, and the interrogation at issue in the present case took place on 24 January 2007, more than one year before the statute’s effective date. Accordingly, we overrule this issue on appeal.

No error.

Judges McGEE and ERVIN concur.

## IN THE COURT OF APPEALS

**WARD v. KANTAR OPERATIONS**

[209 N.C. App. 448 (2011)]

MARK A. WARD, PLAINTIFF V. KANTAR OPERATIONS, DEFENDANT

No. COA10-828

(Filed 1 February 2011)

**Telecommunications— national do-not-call registry—telemarketer**

The trial court did not err by granting defendant's motion for summary judgment on plaintiff's claims that defendant violated certain provisions of the Telemarketing Sales Rule promulgated by the Federal Trade Commission regarding the national "do-not-call" registry. Defendant satisfied its burden of producing sufficient evidence showing that it was not a telemarketer, and plaintiff failed to respond with a forecast of specific facts to show otherwise.

Appeal by plaintiff from order entered 9 April 2010 by Judge Chester C. Davis in Forsyth County District Court. Heard in the Court of Appeals 15 December 2010.

*Mark A. Ward, pro se, plaintiff-appellant.*

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P.,  
by Jang H. Jo, for defendant-appellee.*

HUNTER, Robert C., Judge.

Plaintiff Mark A. Ward appeals from the trial court's order granting defendant Kantar Operations' motion for summary judgment on plaintiff's claims that defendant violated certain provisions of the Telemarketing Sales Rule ("TSR"), promulgated by the Federal Trade Commission ("FTC"). Plaintiff argues on appeal that summary judgment is improper in this case due to a "genuine question of material fact as to whether [defendant] is in fact a telemarketer and whether [defendant] engaged in telemarketing thereby subjecting [defendant] to the Telemarketing Sales Rule." We conclude, however, that defendant, as the party moving for summary judgment, satisfied its burden of producing sufficient evidence showing that it is not a telemarketer and that plaintiff, as the party opposing the motion, failed to respond with a forecast of specific facts creating a genuine issue for trial with respect to whether defendant is a telemarketer. Accordingly, we affirm.

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Facts

On 23 March 2009, plaintiff filed a complaint alleging that “[d]espite Plaintiff’s telephone number being in the FTC’s Do Not Call Registry database, Defendant contacted Plaintiff by telephone” on four separate occasions between 10 March and 20 March 2009. Plaintiff also alleged that during each of these phone calls, “Defendant failed to connect the call to a Representative within two seconds after Plaintiff completed his greeting . . . .” Plaintiff alleged that defendant’s conduct violated the national “do-not-call” registry provision and the call-abandonment provision of the TSR. Plaintiff requested general as well as punitive damages, interest, and costs.

Defendant filed a motion for summary judgment on 24 February 2010, asserting that it was not a “telemarketer” as defined by the TSR and thus was not subject to the regulation’s restrictions. Plaintiff cross-moved for summary judgment, arguing that the “undisputed facts” established that defendant was a telemarketer under federal law and that he was entitled to judgment as a matter of law. After conducting a hearing on the parties’ motions, the trial court entered an order on 9 April 2010 granting defendant’s motion for summary judgment and denying plaintiff’s. Plaintiff timely appealed to this Court.

Discussion

Plaintiff contends that the trial court erred in entering summary judgment in favor of defendant. Summary judgment is proper only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. R. Civ. P. 56(c); *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). “An issue is ‘genuine’ if it can be proven by substantial evidence and a fact is ‘material’ if it would constitute or irrevocably establish any material element of a claim or a defense.” *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). The moving party has the burden of demonstrating the lack of any genuine issue of material fact and entitlement to judgment as a matter of law. *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999). To that end, the evidence produced by the parties is viewed in the light most favorable to the non-moving party. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). A trial court’s ruling on a motion for summary judgment is reviewed *de novo* as the trial court resolves only questions of law. *Va. Elec. and Power Co. v. Tillett*, 80 N.C. App.

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383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

When the moving party, through its forecast of evidence, satisfies its burden of establishing that there are no disputed issues of material fact for trial and that the moving party is entitled to judgment as a matter of law, “the burden shifts to the non-moving party to ‘set forth specific facts showing that there is a genuine issue for trial.’” *Lowe*, 305 N.C. at 369-70, 289 S.E.2d at 366 (quoting N.C. R. Civ. P. 56(e)) (emphasis omitted). The non-moving party “must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party’s case.” *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 204, 271 S.E.2d 54, 57 (1980).

Plaintiff contends that his forecast of evidence is sufficient to establish a violation of the national “do-not-call” registry and call-abandonment provisions of the TSR, 16 C.F.R. §§ 310.1 to 310.9, adopted by the FTC pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”), 15 U.S.C. §§ 6101 to 6108. Congress enacted the Telemarketing Act in 1994, “instruct[ing] the FTC to ‘prescribe rules prohibiting deceptive . . . and . . . abusive telemarketing acts or practices.’” *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 334 (4th Cir. 2005) (quoting 15 U.S.C. § 6102(a)(1)) (second alteration added), *cert. denied*, 547 U.S. 1128, 164 L. Ed. 2d 779 (2006). Congress specifically “directed the FTC to forbid ‘unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy,’ to restrict ‘the hours of the day and night when unsolicited telephone calls can be made,’ and to require that callers disclose information about the nature and purpose of the call.” *Id.* (quoting 15 U.S.C. § 6102(a)(3)).

In response to Congress’ directives, the FTC adopted the original TSR in 1995. The current TSR—most recently amended in 2010, *see* 75 Fed. Reg. 8458-01 (August 10, 2010)—includes the national “do-not-call” registry provision, 16 C.F.R. § 310.4(b)(1)(iii)(B), and the call-abandonment provision, 16 C.F.R. § 310.4(b)(1)(iv). Pertinent to this appeal, the Telemarketing Act authorizes a private cause of action by “[a]ny person adversely affected by any pattern or practice of telemarketing” that violates the TSR. 15 U.S.C. § 6104(a); *accord 800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F. Supp. 2d 273, 296 (D.N.J. 2006) (“[T]he Telemarketing Act . . . states that those persons who are ‘adversely affected’ are authorized to bring a civil action against a deceptive telemarketer.”).

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The national “do-not-call” registry provision of the TSR provides in pertinent part:

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

....

(iii) Initiating any outbound telephone call to a person when:

....

(B) that person’s telephone number is on the “do-not-call” registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services

....

16 C.F.R. § 310.4(b)(1)(iii)(B). The call-abandonment provision similarly provides:

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

....

(iv) Abandoning any outbound telephone call. An outbound telephone call is “abandoned” under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person’s completed greeting.

16 C.F.R. § 310.4(b)(1)(iv). As the language of both provisions indicate, they apply only to “telemarketers,” which the TSR defines as “any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.” 16 C.F.R. § 310.2(cc). “Telemarketing,” in turn, is defined as “a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call.” 16 C.F.R. § 310.2(dd).

The crux of this appeal is whether defendant, who admittedly “initiated” telephone calls to plaintiff, is a “telemarketer” as defined by the TSR. Plaintiff claims that defendant, as the party moving for

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summary judgment, “failed to present to the trial court any verifiable material evidence that [defendant] [i]s in fact *not* a telemarketer as defined by the . . . Telemarketing Sales Rule.” Defendant moved for summary judgment relying primarily on the affidavit of its Chief Executive Officer, Beth Teehan, in which she testified that “[defendant] is a national survey research organization and not a telemarketing company”; that “[defendant] collects data . . . by conducting survey research by contacting persons by telephone only to ask for their opinions”; that “[w]hen [defendant] conducts survey research by telephone, [defendant] does not call to provide, offer to provide, or arrange for others to provide goods or services to the person called in exchange for consideration, and [defendant] does not solicit or induce the purchase of any goods or services or a charitable contribution”; and that “[defendant] is a member in good standing of the Council of American Survey Research Organizations,” the “national association of survey research businesses,” whose “objective is to promote the integrity of survey research through standards, guidelines and best practices.”

Defendant also submitted as exhibits a copy of its “Application for Membership” to the Council of American Survey Research Organizations as well as documents from its corporate website in which it identifies itself as a “national survey research organization.” Defendant also included a “help sheet” titled “Who Are We?,” which instructs its employees to explain to a caller, when the caller states that his or her telephone number is listed on the do-not-call registry, that “the National Do Not Call Legislation was passed to regulate the activities of the telemarketing industry”; that “[a]ccording to the National Do Not Call legislation, legitimate opinion surveys are permissible”; and that “[defendant] is a legitimate opinion research company and . . . never tr[ies] to sell . . . anything.” Defendant’s forecast of evidence—the verified affidavit from its CEO in which she states that defendant is not a telemarketing company, proof of the company’s membership in a national association for survey research organizations, and internal corporate documentation providing instructions to its employees on how to explain to callers that the company is not required to comply with the national do-not-call registry provision of the TSR because it is a “legitimate opinion research company”—is sufficient to establish that defendant is not a telemarketer, thus shifting the burden to plaintiff under N.C. R. Civ. P. 56(e) to “set forth specific facts” showing that defendant is a telemarketer.

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In his affidavit, plaintiff does not provide any specific facts that create a triable issue as to whether defendant is a telemarketer. Plaintiff simply reiterates in a conclusory manner the allegations in his complaint that defendant violated the do-not-call registry provision and the call-abandonment provision of the TSR without forecasting any evidence that defendant's calls were to induce the purchase of goods or services or a charitable contribution. *See Lowe*, 305 N.C. at 370, 289 S.E.2d at 366 ("[S]ubsection (e) of Rule 56 precludes any party from prevailing against a motion for summary judgment through reliance on conclusory allegations unsupported by facts." (emphasis omitted)); *Midulla v. Howard A. Cain, Inc.*, 133 N.C. App. 306, 309, 515 S.E.2d 244, 246 (1999) ("It is well-established that conclusory statements standing alone cannot withstand a motion for summary judgment.").

Plaintiff also states in his affidavit that "[he] was informed that [defendant] is not registered with the Illinois Attorney General Office's Charitable Trust Bureau and [defendant] does not possess any permit to be a survey company and to operate as such in the State of Illinois." It is well-established, however, that "[h]earsay matters included in affidavits should not be considered by a trial court in entertaining a party's motion for summary judgment." *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 776 (1998). As plaintiff's statement regarding defendant's status in Illinois is hearsay, *see* N.C. R. Evid. 801(c), and plaintiff does not argue that the statement falls within any exception to the general rule prohibiting hearsay, *see* N.C. R. Evid. 802, plaintiff's statement cannot form the basis for rebutting defendant's showing that it is not a telemarketer under the TSR. As plaintiff fails to point to any other evidence that would establish a triable issue of fact as to whether defendant is a telemarketer, we conclude that the trial court properly granted summary judgment in favor of defendant.

Affirmed.

Judges CALABRIA and ELMORE concur.

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[209 N.C. App. 454 (2011)]

THE NORTH CAROLINA STATE BAR, PLAINTIFF v. BRENT E. WOOD, ATTORNEY,  
DEFENDANT

No. COA10-463

(Filed 1 February 2011)

**1. Attorneys— disciplinary action—convicted of criminal offense**

The North Carolina State Bar Disciplinary Hearing Commission did not err by disbarring defendant attorney in 2006 and reinstating this disbarment in 2009 based solely upon his conviction of criminal offenses even though no judgment of conviction had been entered against him. N.C.G.S. § 87- 28(b)(1) provides that an attorney must be convicted of a criminal offense showing professional unfitness instead of requiring a judgment of conviction be entered.

**2. Attorneys— disbarment—conditional reinstatement of right to practice law**

The North Carolina State Bar Disciplinary Hearing Commission (DHC) did not err by granting only a conditional reinstatement of defendant attorney's right to practice law rather than vacating the original order of disbarment. Defendant failed to appeal from the 6 August 2007 order vacating his disbarment. Further, DHC had the inherent authority to place the condition upon the vacation of its order of disbarment upon future actions of an appellate court.

**3. Appeal and Error— preservation of issues—default judgment—failure to attack trial court judgment**

The North Carolina State Bar Disciplinary Hearing Commission did not violate defendant attorney's due process rights and the North Carolina Administrative Code by reinstating defendant's disbarment without conducting a hearing. Defendant never moved to vacate the 20 September 2006 entry of default against him and never appealed the 27 October 2006 order of discipline based thereon. Further, all of the facts supporting the reinstatement of defendant's disbarment had been affirmatively established in the prior proceedings.

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Appeal by defendant from a disciplinary order entered 10 December 2009 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 3 November 2010.

*The North Carolina State Bar, by Counsel Katherine Jean and Deputy Counsel David R. Johnson, for plaintiff-appellee.*

*Brent E. Wood, pro se defendant-appellant.*

STEELMAN, Judge.

Where the Disciplinary Hearing Commission of the North Carolina State Bar was only required to find defendant was convicted of a criminal offense in order to impose discipline, the Disciplinary Hearing Commission did not err in imposing discipline on defendant prior to entry of a judgment of conviction. Defendant did not seek review of the 6 August 2007 order conditionally vacating his disbarment; therefore, any arguments relating to that order were not timely made and will not be considered. Where the original order of discipline was based upon a default, the allegations contained in the original complaint are deemed admitted, and defendant was not entitled to a new hearing when his disbarment was reinstated.

I.—Factual and Procedural History

On 11 May 2006, Brent E. Wood (“defendant”) was convicted in the United States District Court for the Eastern District of North Carolina of one count of conspiracy to commit mail fraud and wire fraud, six counts of mail fraud, and one count of conspiracy to commit money laundering. On 20 May 2006, the North Carolina State Bar (“Bar”) filed a complaint against defendant before its Disciplinary Hearing Commission (“DHC”) requesting that disciplinary action be taken against defendant for violations of N.C. Gen. Stat. § 84-28(b)(1) (2006) and Revised Rules of Professional Conduct 8.4(b) and (c). The Bar alleged that “[t]he offenses of which Wood was convicted [were] criminal acts showing professional unfitness in violation of N.C. Gen. Stat. 84-28(b)(1)” and “constitute[d] criminal conduct that reflects adversely upon his honesty, trustworthiness or fitness as a lawyer in violation of Revised Rule 8.4(b) and conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Revised Rule 8.4(c).” An amended complaint was filed by the Bar on 18 July 2006. Defendant failed to answer the Bar’s complaint, and default was entered against defendant on 20 September 2006. Defendant was disbarred in an order of discipline dated 27 October 2006. The order

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of disbarment was based upon both his criminal convictions and conduct involving dishonesty, fraud, deceit or misrepresentation under Revised Rule 8.4(c).

Following the return of the verdict, defendant moved the United States District Court for a judgment of acquittal, or alternatively for a new trial. On 20 July 2007, the Honorable Terrence W. Boyle entered an order granting defendant's motion for judgment of acquittal and conditionally granting defendant's motion for new trial should the judgment of acquittal be reversed or vacated. On 6 August 2007, based upon this order, the DHC vacated defendant's disbarment upon the express proviso that if defendant's conviction was reinstated by an appellate court, his disbarment would be reinstated. This order also provided that the Bar was not precluded from conducting a disciplinary proceeding based upon the underlying facts as provided in N.C. Gen. Stat. § 84-28(d). On 14 August 2009, the United States Court of Appeals for the Fourth Circuit reversed the district court's judgment of acquittal and conditional grant of a new trial, and remanded the matter to the district court for further proceedings consistent with its opinion. Based upon the Court of Appeals' reversal, on 10 December 2009 the DHC reinstated the 27 October 2006 order of disbarment.

Defendant appeals.

**II.—Judgment of Conviction**

[1] In his first argument, defendant contends that the DHC erred in disbarring defendant in 2006 and reinstating this disbarment in 2009 based solely upon his conviction of criminal offenses when no judgment of conviction has been entered against him. We disagree.

Defendant's argument conflates a conviction and a judgment of conviction. In defendant's brief he states that "federal law . . . requires both a jury verdict and sentencing before a defendant is convicted." However, Black's Law Dictionary defines "conviction" as "1. The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty. 2. The judgment (as by a jury verdict) that a person is guilty of a crime." 358 (8th ed. 2004). "Judgment of conviction" is defined as "1. The written record of a criminal judgment, consisting of the plea, the verdict or findings, the adjudication, and the sentence. Fed. R. Crim. P. 32(d)(1). 2. A sentence in a criminal case." Black's Law Dictionary 860 (8th ed. 2004). A judgment of conviction is one step beyond conviction. A judgment of conviction

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involves not only conviction but also the imposition of a sentence. This distinction has been recognized in both North Carolina statutes and case law. N.C. Gen. Stat. § 15A-1331(b) (2009) states “[f]or the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest.” This Court has “interpreted N.C. Gen. Stat. § 15A-1331(b) to mean that formal entry of judgment is not required in order to have a conviction.” *State v. Hatcher*, 136 N.C. App. 524, 527, 524 S.E.2d 815, 817 (2000), citing *State v. Fuller*, 48 N.C. App. 418, 268 S.E.2d 879, *disc. review denied*, 301 N.C. 403, 273 S.E.2d 448 (1980).

Defendant correctly notes that no judgment of conviction has been entered against him for his federal criminal convictions; however, a judgment of conviction is not necessary in order for the DHC to impose discipline. The DHC in its original order disbarred defendant based upon his violations of N.C. Gen. Stat. § 84-28(b)(1) and (2) (2006), which read as follows:

(b) The following acts or omissions by a member of the North Carolina State Bar or any attorney admitted for limited practice under G.S. 84-4.1, individually or in concert with any other person or persons, shall constitute misconduct and shall be grounds for discipline whether the act or omission occurred in the course of an attorney-client relationship or otherwise:

(1) *Conviction* of, or a tender and acceptance of a plea of guilty or no contest to, a criminal offense showing professional unfitness;

(2) The violation of the Rules of Professional Conduct adopted and promulgated by the Council in effect at the time of the act.

(emphasis added). The plain language of this statute requires that an attorney be “*convicted of . . .* a criminal offense showing professional unfitness,” not that a judgment of conviction be entered.

Defendant argues that under Federal Rule of Criminal Procedure 32(k) he has not been convicted of any crimes, since no judgment has been imposed by the district court. He further contends that it was improper to disbar him in the absence of a judgment. Federal Rule of Criminal Procedure 32(k)(1) states:

In General. In the judgment of conviction, the court must set forth the plea, the jury verdict or the court’s findings, the adjudication, and the sentence. If the defendant is found not guilty or is

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otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

This Rule refers to a judgment of conviction, not a conviction. Under the statutes and rules applicable to the entry of an order of discipline, all that is required is a conviction, not a judgment of conviction.

Defendant further contends that the instant case is analogous to the New York Court of Appeals case of *In re Delany*, that held a final order of sanction against an attorney was prematurely imposed because the attorney had pled guilty to several federal crimes but had not yet been sentenced. 663 N.E.2d 625 (N.Y. Ct. App. 1996). However, the applicable New York law stated that “upon a judgment of conviction against an attorney becoming final the appellate division of the supreme court shall order the attorney to show cause why a final order of suspension, censure or removal from office should not be made.” *Id.* at 626. The requirements of the New York law differ from the applicable North Carolina statutes and rules, requiring a judgment of conviction rather than a conviction. We hold that the DHC properly entered an order of discipline against defendant based upon his convictions.

This argument is without merit.

**III.—2007 Order Vacating Order of Disbarment**

[2] In his second argument, defendant contends the DHC erred in only granting a conditional reinstatement of Wood’s right to practice law rather than vacating the original order of disbarment. We disagree.

On 6 August 2007, the DHC ordered that the 27 October 2006 order of discipline entered against defendant be vacated; “provided, however, that should Defendant’s conviction be reinstated by an appellate court, the Order of Discipline dated October 27, 2006 in this matter shall be reinstated.” The order vacating the order of disbarment was entered pursuant to N.C. Gen. Stat. § 84-28(d) (2007) which provides in relevant part:

An order of discipline based solely upon a conviction of a criminal offense showing professional unfitness shall be vacated immediately upon receipt by the Secretary of the North Carolina State Bar of a certified copy of a judgment or order reversing the conviction. The fact that the attorney’s criminal conviction has been overturned on appeal shall not prevent the North Carolina State Bar from conducting a disciplinary proceeding against the attorney

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based upon the same underlying facts or events that were the subject of the criminal proceeding.

Defendant argues that under N.C. Gen. Stat. § 84-28(d) the Bar was required to vacate his disbarment unconditionally, and was without authority to provide that the disbarment would be reinstated if his convictions were reinstated by an appellate court.

We first note that defendant did not appeal the reinstatement order of 6 August 2007. N.C. Gen. Stat. § 84-28(h) (2007) provides in part that:

There shall be an appeal of right by either party from any final order of the Disciplinary Hearing Commission to the North Carolina Court of Appeals. Review by the appellate division shall be upon matters of law or legal inference. The procedures governing any appeal shall be as provided by statute or court rule for appeals in civil cases.

Rule 3(c)(1) of the North Carolina Rules of Appellate Procedure requires that a party must give notice of appeal within thirty days of entry of judgment. In this case, defendant did not appeal the 6 August 2007 order vacating his disbarment. The only question is whether that order was a “final order” as contemplated by N.C. Gen. Stat. § 84-28(h). We hold that it was a final order. Even though the order contained a provision dealing with the possibility that the disbarment could be reinstated, any future action was dependent upon a decision of the federal court, and not upon a further decision or action by the DHC. The Rules and Regulations of the North Carolina State Bar clearly contemplate the DHC imposing conditions on a lawyer’s reinstatement. Section B.0125(d) of the Rules states “[t]he hearing committee may impose reasonable conditions on a lawyer’s reinstatement from disbarment, suspension or disability inactive status in any case in which the hearing committee concludes that such conditions are necessary for the protection of the public.” Annotated Rules of North Carolina 522 (2007). Defendant failed to timely appeal the 6 August 2007 order of the DHC, and this order is not properly before this Court.

Further, we hold that the DHC had the inherent authority to place the condition upon the vacation of its order of disbarment based upon future actions of an appellate court. The Bar has no control over either the criminal trial or appellate process in the state or federal court, and acted appropriately in issuing an order of reinstatement conditioned upon the result of future action in the federal court.

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IV.—Reinstatement of Disbarment without Hearing

[3] In his third argument, defendant contends the DHC erred by reinstating defendant's disbarment without conducting a hearing in violation of defendant's due process rights and the North Carolina Administrative Code. We disagree.

When default is entered due to defendant's failure to answer, the substantive allegations raised by plaintiff's complaint are no longer in issue, and for the purposes of entry of default and default judgment are deemed admitted. However, following entry of default in favor of plaintiff, defendant is entitled to a hearing where he may move to vacate such entry.

*Bell v. Martin*, 299 N.C. 715, 721, 264 S.E.2d 101, 105 (1980) (citation omitted). Defendant never moved to vacate the 20 September 2006 entry of default against him and never appealed the 27 October 2006 order of discipline based thereon. Defendant cannot now challenge the findings of fact and conclusions of law contained in those orders. "Failure to attack the judgment at the trial court level precludes such an attack on appeal." *University of N. Carolina v. Shoemate*, 113 N.C. App. 205, 216, 437 S.E.2d 892, 898 (1994) (citation omitted).

The findings of fact and conclusions of law supporting the defendant's disbarment had been affirmatively established by the prior unchallenged entry of default and order of discipline entered against defendant. Defendant was not entitled to a hearing, because all of the facts supporting the reinstatement of defendant's disbarment had been affirmatively established in the prior proceedings against defendant. *See Martin*, 299 N.C. at 721, 264 S.E.2d at 105.

AFFIRMED.

Judges STEPHENS and ROBERT N. HUNTER, Jr., concur.

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[209 N.C. App. 461 (2011)]

STATE OF NORTH CAROLINA v. RONNIE LEE ZIGLAR

No. COA10-839

(Filed 1 February 2011)

**1. Evidence—hypothetical—lay witness—foundation for opinion absent**

The trial did not abuse its discretion in a prosecution for felony death by vehicle by precluding defendant from testifying about whether he would have been able to stop his car had the brakes worked properly. The question was a hypothetical, but there was no foundational evidence of defendant's perception of his ability to stop the car under the hypothetical circumstances.

**2. Appeal and Error—sentencing within presumptive range—no appeal as of right**

A defendant convicted of felony death by vehicle was not entitled to appeal as a matter of right whether his sentence was supported by evidence introduced at trial where the sentence was within the presumptive range. Defendant did not petition for a writ of *certiorari*.

Appeal by Defendant from judgment and sentence dated 3 June 2009 by Judge John O. Craig, III in Rockingham County Superior Court. Heard in the Court of Appeals 15 December 2010.

*Attorney General Roy Cooper, by Assistant Attorney General Tammera S. Hill, for the State.*

*Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for Defendant.*

STEPHENS, Judge.

*Factual and Procedural Background*

On 4 August 2008, Defendant Ronnie Lee Ziglar ("Ziglar") was indicted on one count of felony death by vehicle pursuant to N.C. Gen. Stat. § 20-141.4(a1). On 9 March 2009, the State notified Ziglar that it intended to prove the existence of two aggravating factors, specifically: (1) that Ziglar "knowingly created a great risk of death to more than one person by means of a weapon or device which would

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normally be hazardous to the lives of more than one person[,]” and (2) that Ziglar used a deadly weapon at the time of the crime.

Ziglar was tried before a jury at the 1 June 2009 Criminal Session of Rockingham County Superior Court, the Honorable John O. Craig, III presiding.<sup>1</sup> The evidence presented by the State at trial tended to show that on 19 May 2008, beginning around 3:30 p.m., Ziglar and Chris Hamby (“Hamby”), the victim in this case, were at Hamby’s home drinking “hard liquor” and “working on the cabinets[.]” Around 5:00 p.m., Hamby and Ziglar left Hamby’s home in Hamby’s Camaro and drove “towards town[;]” Ziglar was driving and Hamby was riding in the passenger seat. Hamby’s wife observed the Camaro drive away from Hamby’s home at a “ridiculous” speed.

As Hamby and Ziglar drove along Lawsonville Avenue near Reidsville, North Carolina, three children observed the Camaro drive past them at a high rate of speed. When the Camaro went around a curve, the children lost sight of the Camaro, but moments later they heard a crash.

Around 5:30 p.m., emergency personnel arrived at the scene of the crash and found the Camaro on fire, Ziglar bleeding but conscious, and Hamby “laying [sic] on his back . . . the upper half of his body in the backseat area . . . bleeding around the ears and the nose . . . . He did not have a pulse and was not breathing.” At trial, Dr. Mark Jordan, a pathologist who conducted a postmortem examination of Hamby, testified that the cause of Hamby’s death was “[b]lunt force trauma to the head due to motor vehicle accident.”

Shortly after the accident, Ziglar was taken to the hospital, where he had his wounds treated and blood drawn. Reidsville Police Department Officer William Gibson (“Officer Gibson”) questioned Ziglar at the hospital and, based on his suspicion that Ziglar was driving the Camaro at the time of the accident, and based on his opinion that Ziglar was “appreciably impaired mentally and physically with a substance that [he] associat[ed] with alcohol[,]” Officer Gibson charged Ziglar with driving while impaired.

Analyses of Ziglar’s blood that evening revealed that at 6:14 p.m., Ziglar’s blood alcohol concentration was 0.267, and at 9:42 p.m., Ziglar’s blood alcohol concentration was 0.17; both of these measurements put Ziglar over the legal limit for alcohol impairment while driving. *See* N.C. Gen. Stat. § 20-138.1 (2007) (“A person commits the

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1. The trial was bifurcated, with the penalty phase following the guilt phase.

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offense of impaired driving if he drives any vehicle upon any highway . . . [a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more . . .").

At trial, Sergeant John Pulliam ("Sergeant Pulliam") of the Reidsville Police Department, an expert in motor vehicle accident reconstruction, estimated that the car was traveling at "75 miles per hour at the initial place where the tire impressions were found" and also testified that at the accident site, he did not see anything on the road to indicate that the brakes had been applied.

Following the close of the State's evidence, Ziglar took the stand and testified that he was driving roughly 60 miles per hour and that when he "got in the curve" just before the accident, he attempted to apply the brakes, but nothing happened. Ziglar testified that he looked down at the brake pedal and "[when] I looked back up[,] we were off the road, and that's when we hit the tree."

Following the close of all evidence, the trial court instructed the jury on felony death by vehicle and the jury found Ziglar guilty.

In the trial's penalty phase, the State presented the testimony of Sergeant Pulliam, who testified that Lawsonville Avenue was a residential street with "medium to medium-high" traffic conditions. Sergeant Pulliam also testified that Ziglar was the only other person injured. The trial court then instructed the jury on the following aggravating factor:

Do you find from the evidence beyond a reasonable doubt the existence of the following aggravating factor? And that is, [Ziglar] knowingly created a great risk of death to more than one person by means of a device which would normally be hazardous to the lives of more than one person.

The jury returned a verdict finding the existence of the aggravating factor. The trial court found as a mitigating factor that the victim was more than 16 years of age and was a voluntary participant in Ziglar's conduct. The court determined that the aggravating and mitigating factors "essentially cancel each other out" and sentenced Ziglar to a term of 34 to 50 months imprisonment, which is at the upper end of the presumptive range of sentencing for the charged offense. Defendant gave notice of appeal of the judgment and sentence in open court.

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*Discussion*

[1] On appeal, Ziglar first argues that the trial court erred by precluding Ziglar from testifying as to whether he would have been able to stop the car had the brakes worked properly. During the direct examination of Ziglar, defense counsel asked, “And had there been brakes that worked on the car, would you have been able to stop the car in your opinion?” Before Ziglar answered, the State objected to the question and the trial court sustained the objection, reasoning “that’s a little bit too speculative.”

Ziglar concedes that he was not testifying as an expert on this subject such that the admissibility of his lay opinion testimony is governed by North Carolina Rule of Evidence 701. Rule 701 provides that where a witness is not testifying as an expert, his testimony in the form of opinions is limited to those opinions which are “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C. Gen. Stat. § 8C-1, Rule 701 (2009). A trial court’s determination of whether a lay witness may testify as to an opinion is reviewed for abuse of discretion. *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001).

In deciding this issue, we note that the question was targeted to a hypothetical situation, *viz.*, under similar circumstances, but in the event that the brakes were working properly, would Ziglar be able to stop the car? Because a lay opinion must be rationally based on the perception of the witness, for Ziglar’s opinion to be admissible, some foundational evidence was required to show that Ziglar had, at some point, perceived his ability, while highly intoxicated, to slow down Hamby’s Camaro as it went through the curve on Lawsonville Avenue at between 60 and 70 miles per hour. Cf. *Matheson v. City of Asheville*, 102 N.C. App. 156, 174, 402 S.E.2d 140, 150 (1991) (requiring foundational evidence of witness’s prior, actual perception of the circumstances posited in a hypothetical question before allowing lay witness’s opinion as to those circumstances). However, no such foundational evidence was presented by Ziglar in this case. As there was no evidence that Ziglar had ever perceived his ability to stop the car under the hypothetical circumstances, the trial court was correct in refusing to admit Ziglar’s testimony.

Nevertheless, Ziglar argues that his lay opinion about stopping the vehicle, like his lay opinion about the vehicle’s speed, should have

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been admitted because, “[l]ike his opinion about the speed, it was based on his perceptions while actually driving the car.” We disagree. While Ziglar’s opinion as to the car’s speed was based on Ziglar’s actual opportunity to observe the car’s speed while driving the car and, therefore, satisfied the Rule 701 foundational requirement, *see, e.g.*, *Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 250, 258 S.E.2d 334, 336 (1979) (“It is well settled in North Carolina that a person of ordinary intelligence and experience is competent to state his opinion as to the speed of a vehicle *when he has had a reasonable opportunity to observe the vehicle and judge its speed.*” (emphasis added)), Ziglar’s opinion as to the car’s potential performance under hypothetical circumstances was never observed by Ziglar, or at least no evidence of such observation was offered by Ziglar. Accordingly, Ziglar’s argument is without merit, and we conclude that the trial court did not abuse its discretion by precluding Ziglar from presenting his opinion on the hypothetical topic. Because this is the only error alleged by Ziglar with respect to the guilt phase of the trial, we find no error in the trial court’s entry of judgment upon the jury’s guilty verdict.

[2] As for the penalty phase of the trial, Ziglar argues that the trial court erred “when it overruled [Ziglar’s] objection to proceeding on the alleged aggravating factor because . . . the aggravator was ‘basically the same thing’ that [Ziglar] was convicted of.” While perhaps correct, Ziglar’s argument overlooks N.C. Gen. Stat. § 15A-1444(a1), which provides that a defendant who has been found guilty “is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing *only if* the minimum sentence of imprisonment does not fall within the presumptive range[.]” N.C. Gen. Stat. § 15A-1444(a1) (2009) (emphasis added).

In this case, Ziglar was convicted of felony death by vehicle, a Class E felony, and was sentenced as a record level III felony offender to an active sentence of 34 to 50 months. At the time of sentencing, in June 2009, the 34-month minimum sentence was within the presumptive range for Ziglar’s prior record level and the class of offense. *See* N.C. Gen. Stat. § 15A-1340.17 (2007). Therefore, pursuant to section 15A-1444(a1), Ziglar is not entitled to appeal as a matter of right the issue of whether his sentence is supported by evidence introduced at the trial. N.C. Gen. Stat. § 15A-1444(a1). Moreover, Ziglar has not petitioned this Court to review the merits of his appeal by writ of

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*certiorari.* Therefore, we hold Ziglar's argument is not properly before us, and accordingly, this argument is dismissed.

NO ERROR in judgment, DISMISSED in part.

Judges STEELMAN and HUNTER, JR., concur.



STATE OF NORTH CAROLINA v. MIKE MILLER

No. COA10-911

(Filed 1 February 2011)

**1. Jurisdiction— subject matter—district court—satellite-based monitoring order**

The district court lacked subject matter jurisdiction to order defendant to enroll in lifetime satellite-based monitoring because N.C.G.S. § 14-208.40B(b) requires that hearings pursuant thereto be held in superior court for the county in which the offender resides.

**2. Jurisdiction— subject matter—superior court—satellite-based monitoring**

The superior court lacked subject matter jurisdiction to order defendant to enroll in lifetime satellite-based monitoring (SBM). Because the district court's order purporting to order defendant to enroll in SBM was from a civil proceeding, the superior court lacked subject matter jurisdiction to hear defendant's appeal from it.

**3. Constitutional Law— ex post facto prohibition—double jeopardy prohibition—satellite-based monitoring—civil regulatory scheme**

Defendant's argument that satellite-based monitoring (SBM) violates the ex post facto and double jeopardy prohibitions of the United States and North Carolina constitutions was overruled. The Court of Appeals was bound by the North Carolina Supreme Court's decision in State v. Bowditch, 364 N.C. 335, holding that the SBM program is a civil regulatory scheme that does not implicate constitutional protections against either ex post facto laws or double jeopardy.

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**4. Constitutional Law— effective assistance of counsel— argument not addressed**

The Court of Appeals did not address defendant's argument that he received ineffective assistance of counsel (IAC) in a satellite-based monitoring (SBM) hearing because the Court vacated both orders imposing SBM on defendant and IAC claims are not available in civil appeals such as from an SBM eligibility hearing.

On writ of *certiorari* by Defendant from order entered 18 March 2010 by Judge Theodore S. Royster, Jr., in Rowan County Superior Court. Heard in the Court of Appeals 13 January 2011.

*Attorney General Roy Cooper, by Assistant Attorney General Lisa Y. Harper, for the State.*

*Daniel M. Blau for Defendant.*

STEPHENS, Judge.

In November 2006, Defendant Mike Miller was convicted of one count of misdemeanor attempted sexual battery in Rowan County District Court. The district court sentenced Defendant to one hundred twenty days in prison, suspended the sentence, and placed Defendant on supervised probation for twenty-four months, with a special condition that he serve thirty days in jail. The district court also ordered Defendant to register as a sex offender and comply with the North Carolina Division of Community Corrections Sex Offender Control Program. The program required Defendant to participate in various evaluation and treatment programs, have no unsupervised contact with minor children, not possess any pornography or consume drugs or alcohol, and submit to warrantless searches.

On 15 September 2009, the district court held a hearing in response to allegations that Defendant had violated terms of his probation. After finding that Defendant had committed certain violations, the district court activated Defendant's one-hundred-twenty-day sentence. Defendant did not appeal from this order. Immediately following the probation revocation hearing, the district court held a hearing pursuant to N.C. Gen. Stat. § 14-208.40B to determine Defendant's eligibility for satellite-based monitoring ("SBM"). On the same day, the district court entered an order finding that Defendant was a recidivist who must enroll in lifetime SBM. Defendant appealed to superior court.

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On 18 March 2010, following a *de novo* hearing on the matter, the superior court entered an order finding that Defendant was a recidivist and ordering him to enroll in lifetime SBM. On 25 June 2010, Defendant filed a petition for writ of *certiorari*; by order of 13 July 2010, this Court dismissed Defendant's petition without prejudice to his right to re-file after first filing a record on appeal. On 2 August 2010, Defendant filed a record on appeal and re-filed his petition for writ of *certiorari*. We allow Defendant's petition and address his arguments here.

In his petition, Defendant brings forward four arguments: that (I) the district court lacked subject matter jurisdiction to order him to enroll in lifetime SBM; (II) the superior court lacked subject matter jurisdiction when it ordered him to enroll in SBM; (III) the SBM program violates constitutional prohibitions on *ex post facto* laws and double jeopardy; and (IV) he received ineffective assistance of counsel at the SBM hearings. As discussed below, we vacate the district and superior court orders requiring Defendant to enroll in lifetime SBM.

*I*

[1] Defendant first argues that the district court lacked subject matter jurisdiction to order him to enroll in lifetime SBM. We agree.

Defendant did not raise this issue below; however, issues of subject matter jurisdiction may be raised at any time. *Ales v. T.A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004). As the State concedes, N.C. Gen. Stat. § 14-208.40B(b) requires that hearings pursuant thereto be held "in superior court for the county in which the offender resides." N.C. Gen. Stat. § 14-208.40B(b) (2009). Thus, the district court lacked subject matter jurisdiction to conduct a hearing on Defendant's eligibility for enrollment in lifetime SBM. "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). Thus, we vacate the district court's 15 September 2009 order.

*II*

[2] Defendant also argues that the superior court lacked subject matter jurisdiction when it ordered him to enroll in SBM. We agree.

As Defendant contends and the State again concedes, the superior court lacked subject matter jurisdiction when it ordered him to enroll

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in SBM. SBM is a civil regulatory scheme, *State v. Bare*, — N.C. App. —, —, 677 S.E.2d 518, 524 (2009), *disc. review denied*, — N.C. —, — S.E.2d — (2010), and hearings on SBM eligibility are civil proceedings. *State v. Singleton*, — N.C. App. —, —, 689 S.E.2d 562, 565, *disc. review allowed*, 364 N.C. 131, 696 S.E.2d 697, *disc. review improvidently allowed*, — N.C. —, — S.E.2d — (2010). An appeal from a final judgment in a civil action in district court lies in this Court, rather than in the superior court. N.C. Gen. Stat. § 7A-27(c) (2009). Because the district court's 15 September 2009 order purporting to order Defendant to enroll in SBM was from a civil proceeding, the superior court lacked subject matter jurisdiction to hear Defendant's appeal from it. Where a case reaches superior court through improper channels, the superior court proceedings must be vacated. *State v. Guffey*, 283 N.C. 94, 96-97, 194 S.E.2d 827, 829 (1973). We thus vacate the superior court's 18 March 2010 order.

*III*

[3] Defendant also argues that SBM violates the *ex post facto* and double jeopardy prohibitions of the United States and North Carolina constitutions. We disagree.

Defendant acknowledges that the North Carolina Supreme Court has previously held that the SBM program is a civil regulatory scheme that does not implicate constitutional protections against either *ex post facto* laws or double jeopardy, *State v. Bowditch*, 364 N.C. 335, S.E.2d (2010), but asks that this Court reconsider the issue. However, we are bound by the decisions of our Supreme Court. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993).

*IV*

[4] Defendant next argues that he received ineffective assistance of counsel ("IAC") to the extent his counsel at the SBM hearings failed to preserve the issue of double jeopardy for appeal. Because we have vacated both the district and superior court orders, we need not address Defendant's contentions on this point. However, we do note in passing that IAC claims are not available in civil appeals such as that from an SBM eligibility hearing. *See State v. Wagoner*, — N.C. App. —, 683 S.E.2d 391 (2009).

Vacated.

Judges GEER and THIGPEN concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 JANUARY 2011)

GUY C. LEE BLDG. MATERIALS v. HARRIS CONSTR. No. 10-221	Wayne (07CVS2330)	Dismissed
GUY C. LEE BLDG. MATERIALS v. HARRIS CONSTR. No. 10-222	Wayne (07CVD2331)	Dismissed
GUY C. LEE BLDG. MATERIALS v. HARRIS CONSTR. No. 10-223	Wayne (07CVD2332)	Dismissed
GUY C. LEE BLDG. MATERIALS v. HARRIS CONSTR. No. 10-224	Wayne (07CVD2335)	Dismissed
IN RE C.D. No. 10-987	Catawba (10JT10)	Affirmed
IN RE F.H. & T.W. No. 10-970	Beaufort (09JA19-20)	Affirmed
IN RE I.S. No. 10-902	Beaufort (09JA55) (09JA59)	Affirmed in part, vacated and remanded in part
IN RE S.M. No. 10-847	Cumberland (09JA495)	Affirmed
MATOS v. THE HAMEL LAW FIRM, P.A. No. 10-864	Mecklenburg (09CVS19875)	Dismissed
SANTOS v. BRIONES No. 09-1563	Wake (08CVD21331)	Affirmed
STATE v. BARNETTE No. 10-620	Alamance (09CRS53340-41)	Affirmed
STATE v. DAVIS No. 10-283	Wake (07CRS71692)	No Error

## IN THE COURT OF APPEALS

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STATE v. FLOYD No. 09-1132	Brunswick (07CRS55823) (07CRS55823) (07CRS7168) (07CRS54186) (07CRS55824) (07CRS53818) (07CRS54188) (07CRS54185) (07CRS53819)	Affirmed
STATE v. HARRIS No. 09-1417	Mecklenburg (07CRS210160-161) (08CRS26076)	No Error
STATE v. KEYS No. 10-112	Cumberland (07CRS1504)	No Error
STATE v. MORGAN No. 10-460	Rowan (07CRS53408)	No Error
STATE v. ROBERTS No. 10-741	Brunswick (07CRS52264-79)	No Error
STATE v. ROBISON No. 10-219	Guilford (07CRS75803-805)	No error in part, vacated and new trial in part
STATE v. VASQUEZ-GUARDO No. 10-683	Mecklenburg (08CRS215540-42)	No Error
STATE v. WILEY No. 09-1122	Orange (08CRS837-838)	Vacated and Remanded

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 FEBRUARY 2011)

CHRISTMAS v. GREYHOUND LINES, INC. No. 10-859	Wake (09CVD5845)	Affirmed
DAVIS v. DAVIS No. 10-471	Guilford (06CVD30)	Affirmed
IN RE A.J.Q. & N.J.Q. No. 10-1212	Dare (08JT55-56)	Affirmed
IN RE A.R.P. & J.B.A.P. No. 10-1086	Burke (08J154-155)	Reversed and Remanded
IN RE H.S.B., D.M.M.B., F.L.B. No. 10-947	Jackson (09JT50-52)	Affirmed
IN RE I.M. & A.M. No. 10-852	Beaufort (08JA73) (09JA89)	Affirmed in part, Reversed in Part and Remanded
IN RE L.H. No. 10-829	Mecklenburg (06JT878)	Affirmed
IN RE M.A.W. No. 10-946	Guilford (08JT847)	Affirmed
IN RE M.I.W. No. 10-1058	Harnett (08J177)	Affirmed
INTEGON NAT'L INS. CO. v. SECHRIST No. 10-484	Guilford (09CVS3085)	Affirmed
SOUTHEAST BRUNSWICK v. CITY OF SOUTHPORT No. 09-1369	Brunswick (08CVS3266)	Affirmed
STATE v. DAVIS No. 09-1378	Sampson (08IFS1760) (08CRS52960-63)	No error in part; vacated and remanded in part

STATE v. FOX No. 10-955	Rowan (07CRS54187)	Vacated and Remanded
STATE v. LEE No. 10-381	Wake (08CRS70176)	No Error
STATE v. RAMIREZ No. 10-293	Mecklenburg (09CRS24358) (06CRS254837)	No Error
STATE v. RICKS No. 10-791	Edgecombe (09CRS51135)	No Error
STATE v. SNIPES No. 10-442	Chatham (08CRS50722)	No error in part; New trial in part
STATE v. SPEARMAN No. 09-1482	Sampson (08CRS54331) (08CRS4646)	No Error
STATE v. WIGGINS No. 10-871	Chowan (07CRS50545) (07CRS51015)	Dismissed

**SPEEDWAY MOTORSPORTS INT'L, LTD. v. BRONWEN ENERGY TRADING, LTD.**

[209 N.C. App. 474 (2011)]

SPEEDWAY MOTORSPORTS INTERNATIONAL LTD., PLAINTIFF v. BRONWEN ENERGY TRADING, LTD., BRONWEN ENERGY TRADING UK, LTD., DR. PATRICK DENYEFA NDIOMU, BNP PARIBAS (SUISSE) SA, BNP PARIBAS S.A., SWIFT AVIATION GROUP, INC., SWIFT AIR, LLC, SWIFT AVIATION GROUP, LLC, AND SWIFT TRANSPORTATION CO., INC., DEFENDANTS

No. COA09-1451

(Filed 15 February 2011)

**1. Appeal and Error— interlocutory orders and appeals—denial of motion to dismiss—personal jurisdiction**

Although defendant Swiss Bank appealed from an interlocutory order denying its motion to dismiss for lack of personal jurisdiction, defendant was entitled to immediate appellate review under N.C.G.S. § 1-277(b).

**2. Jurisdiction— personal—incorporation by reference clause—forum selection clause**

The trial court erred by denying defendant Swiss Bank's motion to dismiss based on lack of personal jurisdiction. The "incorporation by reference" clause in plaintiff's agreement with defendant could not reasonably be construed as subjecting defendant to the forum selection clause when it was intended to identify the contracts that were the subject of the demand guarantee being issued by defendant for plaintiff.

**3. Jurisdiction— personal—long arm statute—minimum contacts—due process**

The trial court did not have personal jurisdiction over defendant Swiss Bank under the North Carolina long arm statute when there were insufficient minimum contacts, and thus, there was no need to address whether exercising jurisdiction over defendant would satisfy the requirements of due process under the Fourteenth Amendment.

Appeal by defendant from order entered 14 July 2009 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 April 2010.

*Parker Poe Adams & Bernstein LLP, by Michael G. Adams and William L. Esser IV, for plaintiff-appellee.*

**SPEEDWAY MOTORSPORTS INT'L, LTD. v. BRONWEN ENERGY TRADING, LTD.**

[209 N.C. App. 474 (2011)]

*Winston & Strawn LLP, by Nash E. Long, III and Valerie B. Mullican, for defendant-appellant BNP Paribas (Suisse) SA.*

GEER, Judge.

Defendant BNP Paribas (Suisse) SA (“BNPP Suisse”), a Swiss bank, appeals from an order denying its motion to dismiss the claims of Speedway Motorsports International Ltd. (“SMIL”) against BNPP Suisse for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Rules of Civil Procedure. In arguing that jurisdiction does exist, SMIL first contends that BNPP Suisse is bound by the North Carolina forum selection clause in SMIL’s contracts with third parties because those contracts were incorporated by reference into SMIL’s agreement with BNPP Suisse. We hold that the “incorporation by reference” clause in SMIL’s agreement with BNPP Suisse cannot reasonably be construed as subjecting BNPP Suisse to the forum selection clause. Instead, the “incorporation by reference” clause was intended simply to identify the contracts that were the subject of the demand guarantee being issued by BNPP Suisse for SMIL.

In the absence of a forum selection clause, SMIL was required to establish that its claims against BNPP Suisse fell within one of the provisions of North Carolina’s long-arm statute and that BNPP Suisse had sufficient minimum contacts with North Carolina. SMIL’s evidence is not, however, sufficient to bring BNPP Suisse within the scope of the long-arm statute. We, therefore, reverse the trial court’s order denying BNPP Suisse’s motion to dismiss.

Facts

In 2006, SMIL, which is “in the business of petroleum products transactions,” opened an account with BNPP Suisse to conduct that business. This case arises out of SMIL’s use of its BNPP Suisse account in connection with a series of contracts pursuant to which SMIL agreed to guarantee lines of credit issued to finance petroleum purchases by other parties during 2007.

In early 2007, defendants Swift Aviation Group, Inc., Swift Air, LLC, Swift Aviation Group, LLC, and Swift Transportation Co., Inc. (collectively “Swift”) were attempting to negotiate a long-term supply contract with Kuwait Petroleum Corporation (“KPC”) pursuant to which Swift would purchase petroleum products from KPC. KPC was not, however, willing to enter into a long-term business relationship with Swift until Swift had proven its ability to successfully execute shorter-term spot contracts.

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Upon the advice of BNP Paribas S.A. (“BNPP France”), a French bank of which BNPP Suisse is a subsidiary, Swift engaged defendants Bronwen Energy Trading, Ltd. and Bronwen Energy Trading UK, Ltd. (collectively “Bronwen”) to assist Swift in executing the spot contracts with KPC. SMIL, which is headquartered in Charlotte, North Carolina, agreed to provide Bronwen with the financial assistance needed to obtain letters of credit for the purchase of the oil under the spot contracts.

On 12 July 2007, Bronwen and SMIL entered into an agreement relating to the delivery of 80,000 metric tons of Jet A-1 (“the First Oil Contract”). Under the First Oil Contract, SMIL agreed to provide BNPP France with a guarantee of \$12,750,000.00 to allow Bronwen to secure from BNPP France one or more letters of credit to effectuate the purchase of the Jet A-1 from KPC. SMIL and Bronwen also agreed: “The funded amount guaranteed will be maintained in SMIL’s account with [BNPP Suisse]. SMIL will execute such document(s) as reasonably required by [BNPP France] to effectuate the guarantee of the funded amount.” The First Oil Contract further provided: “All litigation arising from or related to this agreement shall be heard exclusive [sic] in the state or federal courts sitting in Mecklenburg County, North Carolina, USA. Bronwen hereby irrevocably consents to personal jurisdiction [in] such courts.”

To fulfill its obligations under the First Oil Contract, SMIL executed a guarantee (“the Corporate Guarantee”) to BNPP France later that day. The next day, 13 July 2007, SMIL’s president, William R. Brooks, also emailed the Corporate Guarantee to BNPP Suisse. BNPP France rejected as insufficient SMIL’s Corporate Guarantee on 13 July 2007 and requested that SMIL instead issue instructions to BNPP Suisse to deliver a first demand guarantee to BNPP France. BNPP Suisse also emailed SMIL regarding the Corporate Guarantee and explained:

Thanks for sending your corporate guarantee, but this is not what we need.

What we actually need is your formal request to us, asking us to issue subject first demand guarantee on your behalf in favour of BNPP [France].

We imperatively need these instructions to issue the pament [sic] guarantee on your behalf, otherwise we won’t be in a position to move.

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Accordingly, later that day, 13 July 2007, SMIL sent instructions (“the First Instructions”) to BNPP Suisse to issue a first demand guarantee of \$11,750,000.00 in favor of BNPP France with respect to the fulfillment of the First Oil Contract. The First Instructions stated: “[Bronwen] has a financing facility for principal amount of \$100,000,000 USD which has been granted by [BNPP France] pursuant to an agreement dated dated [sic] 13 December 2006 (the ‘Credit Facility’). SMIL has a business relationship with [Bronwen] pursuant to a separate agreement, a true and correct copy of which is attached hereto as Exhibit A, and which is incorporated herein by reference. The Guaratee is to be issued solely with respect to any amounts drawn by [Bronwen] pursuant to the Credit Facility in [Bronwen’s] fulfillment of Exhibit A. SMIL will maintain a sufficient amount in its account with [BNPP Suisse] to satisfy the Guaratee.” Exhibit A was a copy of the First Oil Contract executed the day before on 12 July 2007.

After SMIL sent the First Instructions to BNPP Suisse, but still on 13 July 2007, SMIL and Bronwen entered into an amended oil contract (“Amended Oil Contract”), which, by its terms, “supersede[d]” the First Oil Contract executed the previous day. The Amended Oil Contract reduced to \$11,750,000.00 the amount guaranteed by SMIL to BNPP France for Bronwen’s benefit. Like the First Oil Contract, it provided that the guaranteed amount would be maintained in SMIL’s account with BNPP Suisse, and it again stated: “All litigation arising from or related to this agreement shall be heard exclusive [sic] in the state or federal courts sitting in Mecklenburg County, North Carolina, USA. Bronwen hereby irrevocably consents to personal jurisdiction [in] such courts.”

Three days later, on 16 July 2007, BNPP Suisse acknowledged receipt of the First Instructions, but it informed SMIL that it “need[ed] a request with the actual wording of the guarantee” BNPP Suisse was to issue to BNPP France, as opposed to the more general wording of the First Instructions. BNPP Suisse included a draft of a first demand guarantee for SMIL’s review. In addition to referencing the purchase by Bronwen of 80,000 metric tons of Jet A-1, as governed by the First Oil Contract and the Amended Oil Contract, the draft also referred to a purchase of 60,000 metric tons of Gasoil from KPC. The last line of the first demand guarantee stated: “This guarantee is subject to Swiss Law, place of jurisdiction is Geneva.”

Later that day, SMIL emailed BNPP Suisse a revised version of the first demand guarantee. The revised version was substantially similar

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to BNPP Suisse's draft. It confirmed that SMIL agreed to be responsible for Bronwen's repayment of the \$11,750,000.00 credit issued to KPC, pursuant to the Amended Oil Contract, and it included the Geneva forum selection clause. It deleted the reference to the 60,000 metric tons of Gasoil that was not part of the Amended Oil Contract. SMIL's president, Mr. Brooks, signed the document after adding the following sentence: "All claims are to be sent to my attention at [Mr. Brooks' email address], and by fax to [a Charlotte, North Carolina fax number]." SMIL also noted in its email attaching the revised "guarantee form" that it had also attached "a superseding agreement [the Amended Oil Contract] between [SMIL] and [Bronwen] that is to be used in substitution for the Exhibit A [SMIL] originally sent to [BNPP Suisse]."

On appeal, the parties do not agree on the purpose or effect of the 16 July 2007 draft first demand guarantee sent by SMIL to BNPP Suisse. BNPP Suisse refers to the document as an actual guarantee by SMIL in favor of BNPP Suisse. SMIL insists that this draft of the first demand guarantee was merely an "Approval Document" that was approving the form of the first demand guarantee BNPP Suisse was going to send to BNPP France. SMIL contends that this Approval Document, which contained the Geneva forum selection clause, was not intended to supersede the First Instructions, which—SMIL argues—had the effect of incorporating by reference the North Carolina forum selection clause contained in the Bronwen contracts. In SMIL's complaint, however, SMIL referred to the 16 July 2007 document as a "supplemental guarantee."

Meanwhile, also on 16 July 2007 (but apparently before BNPP Suisse received SMIL's response with the revised version of the first demand guarantee), BNPP Suisse went ahead and issued a first demand guarantee to BNPP France by which BNPP Suisse promised that it would be responsible for Bronwen's repayment of the letters of credit to BNPP France. The first demand guarantee referenced both the 80,000 metric tons of Jet A-1 and the 60,000 metric tons of Gasoil, and it contained the Geneva forum selection clause.

Subsequently, on 19 July 2007, Bronwen and SMIL entered into a second oil contract ("the Second Oil Contract"). Under the Second Oil Contract, SMIL agreed to provide a first demand guarantee to BNPP France for an additional \$4,000,000.00 to allow Bronwen to secure letters of credit to effectuate the purchase of 68,000 metric tons of Gasoil. Like the First and Amended Oil Contracts, it provided that the

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guaranteed amount would be maintained in SMIL's account with BNPP Suisse, and it stated: "All litigation arising from or related to this agreement shall be heard exclusively in the state or federal courts sitting in Mecklenburg County, North Carolina, USA. Bronwen hereby irrevocably consents to personal jurisdiction in such courts."

On 23 July 2007, pursuant to the Second Oil Contract, SMIL sent BNPP Suisse new instructions ("the Second Instructions") directing BNPP Suisse to increase the amount of the first demand guarantee in favor of BNPP France by \$4,000,000.00, bringing the total amount to \$15,750,000.00. The Second Instructions stated: "SMIL has new business with [Bronwen] pursuant to a separate agreement [the Second Oil Contract], a true and correct copy of which is attached hereto as Exhibit A, and which is incorporated herein by reference. The additional \$4,000,000 of the Guarantee is to be issued solely with respect to any amounts drawn by [Bronwen] pursuant to the Credit Facility in [Bronwen's] fulfillment of Exhibit A."

Approximately two weeks later, on 7 September 2007, Bronwen and SMIL entered into yet another contract ("the Third Oil Contract"). Under the Third Oil Contract, SMIL agreed to provide a first demand guarantee to BNPP France in the amount of \$12,000,000.00 to allow Bronwen to secure letters of credit to effectuate the purchase of three shipments of 65,000 metric tons of Gasoil each. Like the previous Oil Contracts, the Third Oil Contract provided that the guaranteed amount would be maintained in SMIL's account with BNPP Suisse, and it stated: "All litigation arising from or related to this agreement shall be heard exclusively in the state or federal courts sitting in Mecklenburg County, North Carolina, USA. Bronwen hereby irrevocably consents to personal jurisdiction in such courts."

The same day, SMIL sent BNPP Suisse instructions ("the Third Instructions") directing BNPP Suisse to reduce the amount of the first demand guarantee to \$12,000,000.00. The Third Instructions stated: "SMIL has new business with [Bronwen] pursuant to a separate agreement [the Third Oil Contract], a true and correct copy of which is attached hereto as Exhibit A, and which is incorporated herein by reference. The \$12,000,000 Guarantee is to be issued solely with respect to any amounts drawn by [Bronwen] pursuant to the Credit Facility in [Bronwen's] fulfillment of Exhibit A."

A week later, on 14 September 2007, SMIL sent BNPP Suisse "updated" instructions ("the Fourth Instructions"). The Fourth Instructions reiterated the \$12,000,000.00 amount of the first demand

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guarantee and stated: "This Guarantee will cover all current business SMIL has with [Bronwen] pursuant to separate agreements [the Amended, Second, and Third Oil Contracts], true and correct copies of which are attached hereto as Exhibit A, and which are incorporated herein by reference. The \$12,000,000 Guarantee is to be issued solely with respect to any amounts drawn by [Bronwen] pursuant to the Credit Facility in [Bronwen's] fulfillment of the contracts attached as Exhibit A."

In early November 2007, BNPP France determined that losses related to the Oil Contracts exceeded \$17,000,000.00. BNPP France notified Bronwen and SMIL that BNPP France believed it had a right to draw on SMIL's account to cover its losses. SMIL disputed this claim, reminding BNPP France that the first demand guarantee only covered letters of credit issued to effectuate purchase of oil under the Oil Contracts and insisting that Bronwen's debt was not related to the purchase price of oil under the pertinent Oil Contracts. Because BNPP France nonetheless maintained that it had a right to draw on the first demand guarantee, SMIL announced on 6 November 2007 that it was terminating the first demand guarantee. The next day, however, BNPP Suisse notified SMIL that it had received a demand from BNPP France. Despite SMIL's protest, BNPP Suisse paid BNPP France \$12,000,000.00 on 9 November 2007 and immediately debited SMIL's account for that amount.

SMIL filed a complaint on 22 April 2008, an amended complaint on 29 May 2008, and a second amended complaint on 25 September 2008, asserting claims for, *inter alia*, breach of contract against Bronwen and Swift; wrongful honor against BNPP Suisse; fraud and negligent misrepresentation against BNPP France; breach of demand guarantee and conversion against BNPP Suisse and BNPP France; equitable subrogation to BNPP France's claims against Bronwen and Swift; and unfair and deceptive trade practices against all defendants. SMIL also asserted that it was entitled to an accounting from all defendants. With respect to personal jurisdiction, SMIL alleged that Bronwen, Swift, BNPP France, and BNPP Suisse had all "agreed in their contracts with SMIL to the jurisdiction of this [North Carolina] Court to resolve all disputes."

On 4 August 2008, BNPP Suisse moved to dismiss SMIL's claims against BNPP Suisse for lack of personal jurisdiction pursuant to Rule 12(b)(2). The Business Court denied BNPP Suisse's motion in an order entered 14 July 2009. The court's order contained no findings of

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fact, stating only: “After considering the Court file, the written Motion, the briefs of the parties, and the arguments of counsel, the Court DENIES the Motion.” BNPP Suisse timely appealed from the order to this Court.

Discussion

[1] On appeal, BNPP Suisse contends that the trial court erred in denying its motion to dismiss for lack of personal jurisdiction. Although the order denying the motion to dismiss is an interlocutory order, BNPP Suisse’s appeal of the trial court’s Rule 12(b)(2) decision is proper under N.C. Gen. Stat. § 1-277(b) (2009). *See Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982) (“[T]he right of immediate appeal of an adverse ruling as to jurisdiction over the person, under [N.C. Gen. Stat. § 1-277(b)], is limited to rulings on ‘minimum contacts’ questions, the subject matter of Rule 12(b)(2).”).

“Generally, determining whether a court can exercise personal jurisdiction over a nonresident defendant necessitates the implementation of a two-step inquiry: (1) Does a North Carolina statute authorize the court to entertain an action against that defendant; and (2) If so, does the defendant have sufficient minimum contacts with the state so that considering the action does not conflict with ‘traditional notions of fair play and substantial justice.’” *Montgomery v. Montgomery*, 110 N.C. App. 234, 237, 429 S.E.2d 438, 440 (1993) (quoting *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 95-96, 414 S.E.2d 30, 35 (1992)). The burden is on the plaintiff to establish that some ground exists for the exercise of personal jurisdiction over the defendant. *Jaeger v. Applied Analytical Indus. Deutschland GMBH*, 159 N.C. App. 167, 170, 582 S.E.2d 640, 643-44 (2003).

“When this Court reviews a decision as to personal jurisdiction, it considers only ‘whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.’” *Banc of Am. Secs. LLC v. Evergreen Int’l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005) (quoting *Replacements, Ltd. v. MidWestSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999)). Under Rule 52(a)(2) of the Rules of Civil Procedure, the trial court is not, however, required to make specific findings of fact unless requested by a party. *Banc of Am. Secs.*, 169 N.C. App. at 694, 611 S.E.2d at 183. When, as in this case, the order contains no findings of fact, “[i]t is presumed . . . that the court on proper evidence found facts to support its judgment.”

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*Id.* (quoting *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524, *disc. review denied*, 303 N.C. 314, 281 S.E.2d 651 (1981)).

## I

[2] SMIL first contends that the trial court's decision denying BNPP Suisse's motion to dismiss may be upheld on the grounds that BNPP Suisse consented to personal jurisdiction in North Carolina. As this Court has recognized, “[o]ne means by which a party may consent to personal jurisdiction, encountered most often in the commercial context, is a forum selection provision in a contractual agreement.” *Montgomery*, 110 N.C. App. at 238, 429 S.E.2d at 441. When a party has consented to jurisdiction through a forum selection clause, the courts need not consider the applicability of the State's long-arm statute or whether minimum contacts exist. *Id.* at 237, 429 S.E.2d at 440.

In support of its contention that BNPP Suisse agreed to jurisdiction in North Carolina, SMIL points to the Instructions it sent to BNPP Suisse that both SMIL and BNPP Suisse agree are part of their contractual relationship. The Fourth Instructions—which, on 7 November 2007, SMIL described as the “currently operative” Instructions—state: “This Guarantee will cover all current business SMIL has with [Bronwen] pursuant to separate agreements, true and correct copies of which are attached hereto as Exhibit A, and which are *incorporated herein by reference*.” (Emphasis added.) SMIL argues that the Instructions’ incorporation by reference of the Oil Contracts, each of which contained a North Carolina forum selection clause, effectively incorporated into the Instructions that forum selection clause, resulting in an agreement by BNPP Suisse to litigate “in the state or federal courts sitting in Mecklenburg County, North Carolina.” BNPP Suisse, on the other hand, contends that the incorporation by reference clause was included in the Instructions “solely to identify the specific transactions covered by the Demand Guarantee.”

It is well established that “[w]hen a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law.” *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624 (1973). “If the contract is ambiguous, however, interpretation is a question of fact, and resort to extrinsic evidence is necessary.” *Crider v. Jones Island Club, Inc.*, 147 N.C. App. 262, 266-67, 554 S.E.2d 863, 866 (2001) (internal citation omitted), *cert. denied*, 356 N.C. 161, 568 S.E.2d 192 (2002).

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SMIL relies on *Booker v. Everhart*, 294 N.C. 146, 152, 240 S.E.2d 360, 363 (1978), in which our Supreme Court held that “[t]o incorporate a separate document by reference is to declare that the former document shall be taken as part of the document in which the declaration is made, as much as if it were set out at length therein.” SMIL points to the fact that, in *Booker*, the Court held that a promissory note was not a negotiable instrument because it incorporated by reference the terms of a deed of separation and property settlement and, thereby, “the parties made the note ‘subject to’ any and all possible conditions contained in those prior documents.” *Id.* SMIL contends that, in this case, the Instructions’ incorporation by reference of the Oil Contracts should, therefore, have made BNPP Suisse subject to the forum selection clause in the Oil Contracts.

SMIL has, however, overlooked the fact that the promissory note in *Booker* expressly incorporated “the terms” of the underlying agreements. The Supreme Court, which was applying N.C. Gen. Stat. § 25-3-105, stressed: “[I]t is clear that mere reference in a note to the separate agreement or document out of which the note arises does not affect the negotiability of the note. But to go beyond a reference to the separate agreement, by incorporating the terms of that agreement into the note, makes the note ‘subject to or governed by’ that agreement, and thus, under G.S. 25-3-105(2)(a), renders the promise conditional and the note nonnegotiable.” *Booker*, 294 N.C. at 153, 240 S.E.2d at 364.

More recently, in *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs.*, 362 N.C. 269, 658 S.E.2d 918 (2008), our Supreme Court applied *Booker*’s principles regarding incorporation by reference in addressing whether a party was bound by an indemnification provision. While the prime contract with respect to a construction project included an indemnification provision, the subprime agreement did not. As the Court noted, however, “[t]he Subprime Agreement at issue . . . incorporate[d] by reference terms of the Prime Agreement.” *Schenkel & Shultz*, 362 N.C. at 273, 658 S.E.2d at 921. After quoting *Booker*’s principle that incorporating a document by reference makes it part of the subsequent document “as much as if it were set out at length therein,” *Schenkel & Shultz*, 362 N.C. at 273, 658 S.E.2d at 922 (quoting *Booker*, 294 N.C. at 152, 240 S.E.2d at 363), the Supreme Court nonetheless concluded, given the precise language, that an ambiguity still arose regarding “the intended scope of the reference in the Subprime Agreement to the Prime Agreement” and “[w]hether or not the parties intended to incorporate the express indemnification

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provision of the Prime Agreement” when incorporating the Prime Agreement into the Subprime Agreement. *Id.* at 275, 658 S.E.2d at 922.

In sum, *Booker* provides that if a document incorporates a second document by reference, it effectively makes that second document part of the first without taking the time and space to set out the second document word for word. As *Schenkel & Shultz* demonstrates, however, a question still remains as to what the parties intended when they incorporated the second document.

Binding the parties to a provision in the incorporated document is only one possible result, as in *Elec-Trol, Inc. v. C. J. Kern Contractors, Inc.*, 54 N.C. App. 626, 628, 284 S.E.2d 119, 120 (1981) (enforcing as to subcontractor dispute resolution provision contained in general contractor’s contract with owner because general contractor’s contract with owner was incorporated by reference in subcontract), *disc. review denied*, 305 N.C. 298, 290 S.E.2d 701 (1982). For example, when a trial court incorporates by reference another document into an order, the intent of the trial court will not necessarily be to adopt all the contents of that document as binding. Rather, it may simply be using incorporation by reference to avoid having to summarize the contents of a piece of evidence on which it was relying when making its findings. See, e.g., *In re A.S.*, 190 N.C. App. 679, 693-94, 661 S.E.2d 313, 322 (2008) (“In this case, the trial court did not err when, while summarizing the evidence considered by the court, it incorporated the DSS and GAL reports by reference rather than specifically describing the content of those reports.”), *aff’d per curiam*, 363 N.C. 254, 675 S.E.2d 361 (2009); *In re M.R.D.C.*, 166 N.C. App. 693, 698, 603 S.E.2d 890, 893 (2004) (explaining that “although the trial court may properly incorporate various reports into its order, it may not use these as a substitute for its own independent review”), *disc. review denied*, 359 N.C. 321, 611 S.E.2d 413 (2005); *In re A.E.*, 193 N.C. App. 454, 667 S.E.2d 340, 2008 WL 4635387, \*5, 2008 N.C. App. LEXIS 1823, \*13 (Oct. 21, 2008) (unpublished) (“The trial court’s incorporation of [the doctor’s] report served the same purpose as if the court had summarized the contents of that report in order to describe the evidence before it—much like an order’s summarizing what a witness testified.”).

We do not believe that SMIL’s interpretation of the “incorporation by reference” of the Oil Contracts is reasonable. In contrast to *Booker* and other decisions cited by SMIL, the Instructions do not incorporate the “terms” of the Oil Contracts, but rather the Instructions refer to the Oil Contracts as “separate agreements” that are generally incorpo-

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rated: “This Guarantee will cover all current business SMIL has with [Bronwen] pursuant to separate agreements, true and correct copies of which are attached hereto as Exhibit A, and which are incorporated herein by reference.”

This reference to “separate agreements” is consistent with the “independence principle,” which is a fundamental aspect of letter of credit transactions such as this one: “It is emphasized by all the sources we have found that the basic aspect of the successful use of letters of credit lies in recognizing at the threshold that every letter of credit involves separate and distinct contracts; and that the contract between the issuing bank and the beneficiary to pay money to the beneficiary upon demand (and documentation if called for) *must be kept chaste [and] independent of the underlying contract* between the purchaser of the letter and the beneficiary.” *Sunset Invs., Ltd. v. Sargent*, 52 N.C. App. 284, 288, 278 S.E.2d 558, 561 (emphasis added), *disc. review denied*, 303 N.C. 550, 281 S.E.2d 401 (1981). *See also* N.C. Gen. Stat. § 25-5-103(d) (2009) (“Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.”).

SMIL’s proposed construction of the incorporation by reference language as making the terms of the underlying Oil Contracts binding on BNPP Suisse is not consistent with the Instructions’ characterization of those contracts as “separate agreements.” Nor is it consistent with the fundamental independence principle governing letter of credit transactions. Moreover, we cannot see how the terms of the Oil Contracts apart from the forum selection clause could be applicable to the relationship between SMIL and BNPP Suisse—yet, SMIL’s proposed construction would nonetheless make those terms part of the contract between SMIL and BNPP Suisse.

Instead, the plain language of the Instructions indicates that the purpose of the incorporation by reference of the Oil Contracts is to specifically identify what contracts were being guaranteed by SMIL without having to set out the details of those contracts. This construction is supported by the sentence immediately following the incorporation by reference, which states: “The \$12,000,000 Guarantee is to be issued solely with respect to any amounts drawn by

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[Bronwen] pursuant to the Credit Facility in [Bronwen's] fulfillment of the contracts attached as Exhibit A."

We do not believe that the Instructions can be reasonably construed to make the forum selection clause in the underlying contracts binding on BNPP Suisse. Consequently, we cannot conclude that the "language of [the] contract is fairly and reasonably susceptible to . . . the construction[] asserted by" SMIL. *Barrett Kays & Assocs. v. Colonial Bldg. Co., Inc. of Raleigh*, 129 N.C. App. 525, 528, 500 S.E.2d 108, 111 (1998) (quoting *Bicket v. McLean Secs., Inc.*, 124 N.C. App. 548, 553, 478 S.E.2d 518, 521 (1996), *disc. review denied*, 346 N.C. 275, 487 S.E.2d 538 (1997)). The Instructions are, therefore, not ambiguous and must be enforced in accordance with their plain language. *Id.*

Even if we could find the language ambiguous, SMIL has overlooked "[o]ne of the most fundamental principles of contract interpretation"—that "ambiguities are to be construed against the party who prepared the writing." *Chavis v. Southern Life Ins. Co.*, 318 N.C. 259, 262, 347 S.E.2d 425, 427 (1986). This Court has stressed that "[b]efore this rule of construction should be applied, the record should affirmatively show that the form of expression in words was actually chosen by one [party] rather than by the other." *Joyner v. Adams*, 87 N.C. App. 570, 577, 361 S.E.2d 902, 906 (1987) (internal quotation marks omitted) (holding that rule did not apply when record showed that sophisticated parties engaged in protracted negotiation process in which language was assented to by both parties who each had knowledge to understand language and bargaining power to alter it).<sup>1</sup>

Here, SMIL was responsible for the language of the Instructions. BNPP Suisse did not participate in any negotiations regarding the specific language used in the Instructions—SMIL chose the incorporation by reference language on its own. Accordingly, under *Joyner*, any ambiguity regarding the intent of the incorporation by reference clause—including whether it was intended to make the choice of forum clause binding on BNPP Suisse—must be construed against SMIL and in favor of BNPP Suisse. Consequently, the Instructions must be read as simply referring to the Oil Contracts rather than

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1. This Court explained that "[t]he rule is essentially one of legal effect, of construction rather than interpretation, since it can scarcely be said to be designed to ascertain the meanings attached by the parties." *Joyner*, 87 N.C. App. at 576, 361 S.E.2d at 905 (internal quotation marks omitted).

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adopting as binding all the terms—including the North Carolina forum selection clause—contained therein. Thus, the trial court could not have properly concluded, as a basis for its denial of the motion to dismiss, that BNPP Suisse had consented to personal jurisdiction in North Carolina.

## II

[3] Having determined that the evidence fails to support any finding that BNPP Suisse consented to personal jurisdiction, we turn to the question whether the evidence would permit a finding that personal jurisdiction over BNPP Suisse exists under North Carolina's long-arm statute and that BNPP Suisse has sufficient minimum contacts with North Carolina to satisfy the requirements of due process. At the outset of this analysis, we must address SMIL's assertion that “[a]lthough case law is mixed on this point, the weight of authority suggests that it is not necessary to separately evaluate whether jurisdiction is authorized by the long-arm statute[.]”

SMIL is correct in noting that this Court has previously generally described the long-arm statute analysis as collapsing into the minimum contacts analysis. *See, e.g., Lang v. Lang*, 157 N.C. App. 703, 708, 579 S.E.2d 919, 922 (2003) (“Since the North Carolina legislature designed the long-arm statute to extend personal jurisdiction to the limits permitted by due process, the two-step inquiry merges into one question: whether the exercise of jurisdiction comports with due process.” (quoting *Regent Lighting Corp. v. Galaxy Elec. Mfg., Inc.*, 933 F. Supp. 507, 510 (M.D.N.C. 1996))).

More recently, however, our Supreme Court has emphasized that deciding a motion to dismiss based on Rule 12(b)(2) involves two separate steps of analysis: “To ascertain whether North Carolina may assert personal jurisdiction over a nonresident defendant, we employ a two-step analysis. Jurisdiction over the action must *first* be authorized by N.C.G.S. § 1-75.4. *Second*, if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.” *Brown v. Ellis*, 363 N.C. 360, 363, 678 S.E.2d 222, 223 (2009) (emphasis added) (internal citations and quotation marks omitted). We “are bound to follow” the framework laid out by the Supreme Court and, accordingly, we apply the two-step analysis. *State v. Parker*, 140 N.C. App. 169, 172, 539 S.E.2d 656, 659 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 394, 547 S.E.2d 37, *cert. denied*, 532 U.S. 1032, 149 L. Ed. 2d 777, 121 S. Ct. 1987 (2001).

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With respect to the long-arm statute, we are mindful that its provisions “should be liberally construed in favor of finding personal jurisdiction.” *Fungaroli*, 51 N.C. App. at 365, 276 S.E.2d at 522. “[I]f the evidence supports a finding which comports with one of the [statute’s] provisions, jurisdiction will follow under the long-arm statute.” *Dataflow Cos. v. Hutto*, 114 N.C. App. 209, 212, 441 S.E.2d 580, 582 (1994). If, however, “there is *no* evidence to support an essential finding of fact,” no jurisdiction exists. *Spivey v. Porter*, 65 N.C. App. 818, 819, 310 S.E.2d 369, 370 (1984).

The only statutory basis for jurisdiction asserted by SMIL is N.C. Gen. Stat. § 1-75.4(4)(a) (2009), which provides for personal jurisdiction when the plaintiff claims an injury “within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury . . . [s]olicitation or services activities were carried on within this State by or on behalf of the defendant[.]” In order for N.C. Gen. Stat. § 1-75.4(4)(a) to apply, a plaintiff “must establish: 1) an action claiming injury to a North Carolina person or property; 2) that the alleged injury arose from activities by the defendant outside of North Carolina; and 3) that the defendant was engaging in solicitation or services within North Carolina ‘at or about the time of the injury.’” *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 113, 516 S.E.2d 647, 649-50 (1999) (quoting N.C. Gen. Stat. § 1-75.4(4)(a)). SMIL argues that § 1-75.4(4)(a) applies “because there is a foreign act causing a local injury to SMIL (which is headquartered in Charlotte) and [BNPP] Suisse was conducting solicitation activities, namely [1] soliciting the instructions from SMIL and [2] advertising at the Davis Cup tournaments in Winston-Salem.”

The key question here is whether, as a matter of law, the evidence of BNPP Suisse’s conduct constitutes “solicitation” under § 1-75.4(4)(a). The evidence in the record shows that SMIL opened an account with BNPP Suisse in 2006 to facilitate its business of engaging in petroleum products transactions. With respect to the series of transactions at issue, Mr. Brooks’ affidavit reveals that he personally emailed a copy of the Corporate Guarantee to BNPP Suisse *first*. Only *after* receiving the Corporate Guarantee from SMIL did BNPP Suisse contact SMIL to relay the request that SMIL should instead issue instructions to BNPP Suisse that would govern a guarantee to be issued by BNPP Suisse to BNPP France, as required by BNPP France. SMIL fails to explain how BNPP Suisse’s response to an email from an existing customer to effectuate a business transaction

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between the customer and a third party, BNPP France, amounts to solicitation of SMIL's business.

Moreover, although SMIL alleged that it would not have issued the Instructions "but for [BNPP Suisse's] solicitation," the evidence shows that the request for instructions originated from BNPP France as the precondition for BNPP France's financing of the Bronwen contracts. Under the Oil Contracts, SMIL was obligated to maintain "[t]he funded amount guaranteed . . . in SMIL's account with [BNPP Suisse]" and to "execute such document(s) as reasonably required by [BNPP France] to effectuate the guarantee of the funded amount." Thus, contrary to the contentions on appeal, SMIL's transaction with BNPP Suisse was the result not of any solicitation by BNPP Suisse, but rather was the consequence of provisions in the Oil Contracts. The evidence does not, therefore, support any contention that the request for instructions constituted a solicitation in North Carolina by BNPP Suisse at or near the time of SMIL's injury.

SMIL points to *Brown*, 363 N.C. at 363-64, 678 S.E.2d at 224, in which the Supreme Court held that the plaintiff, who claimed alienation of affection, had alleged facts sufficient to authorize the exercise of personal jurisdiction over the nonresident defendant pursuant to N.C. Gen. Stat. § 1-75.4(4)(a) when the plaintiff's complaint alleged that the defendant "initiat[ed]" the calls and emails at issue. Here, however, SMIL cites to no evidence showing BNPP Suisse ever initiated any business relationship or transaction with SMIL. See *Tutterrow v. Leach*, 107 N.C. App. 703, 709, 421 S.E.2d 816, 820 (1992) ("The record reflects that defendants never solicited their business within North Carolina; in fact, plaintiff Tutterrow was the first to initiate any contact with defendants."), *appeal dismissed*, 333 N.C. 466, 428 S.E.2d 185 (1993).

Next, as to the alleged advertising by BNPP Suisse, SMIL has failed to cite to evidence showing such advertising is attributable to any company aside from BNPP Suisse's parent company, BNPP France. There is no question that BNPP France sponsored the Davis Cup, an international tennis competition. The record provides abundant evidence of BNPP France's advertising in 2007 and 2008 at Davis Cup quarterfinal matches in Winston-Salem, North Carolina, including photographs of the BNP Paribas logo on structures at the events and copies of Davis Cup programs containing the logo. There is no evidence, however, that BNPP Suisse, an entirely separate corporate entity, sponsored anything in Winston-Salem.

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SMIL argues that BNPP Suisse, as part of the BNP Paribas “group,” should be subject to North Carolina jurisdiction because BNPP Suisse benefitted from the advertising at the Davis Cup. According to Mr. Brooks’ affidavit, in Davis Cup programs, “the name ‘BNP Paribas’ is not targeted to a specific entity. Rather, it *appears* to apply to all entities within the larger overall BNP Paribas corporate group, including” BNPP Suisse. (Emphasis added.) SMIL also emphasizes on appeal that the BNP Paribas logo “features the most prominent part of [BNPP Suisse’s] name.” Yet SMIL cites no authority that would subject a subsidiary called “BNP Paribas (Suisse)” to personal jurisdiction in this State simply because a parent company called “BNP Paribas” advertised here using its *own* name, simply on the grounds that the names are similar.

Mr. Brooks’ affidavit also directs the reader to a “Sponsoring” tab on the BNPP Suisse website. Clicking on that tab redirects the Internet user to the BNPP France website’s tennis page. If the Internet user then clicks on the Davis Cup link on that BNPP France page, he or she is then taken to information about the Davis Cup and the fact that “BNP Paribas is the ‘Official Sponsor of the Davis Cup’ as well as the ‘title sponsor.’” Mr. Brooks’ repeated identification of the Davis Cup page on the BNPP France website as “[t]he [BNPP] Suisse Davis Cup Page” is an unsupported stretch.<sup>2</sup> The mere fact—and SMIL offers nothing more—that an Internet user clicking on a series of links starting at the BNPP Suisse page eventually ends up at the BNPP France page regarding BNPP France’s sponsorship of the Davis Cup, which happened to hold matches in Winston-Salem, does not establish that BNPP Suisse engaged in advertising in North Carolina.

We cannot impute the actions of BNPP France to BNPP Suisse for purposes of personal jurisdiction without proof that the banks are part of the same whole and were not acting independently. In *Wyatt v. Walt Disney World Co.*, 151 N.C. App. 158, 168, 565 S.E.2d 705, 711 (2002), the plaintiffs similarly “assert[ed] a general relationship among various commercial enterprises with some connection to WDWCO [the defendant Walt Disney World Company]. . . . In effect, plaintiffs invite[d] this Court to treat the entire ‘Disney empire,’ and

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2. While SMIL argues vigorously that this Court must accept SMIL’s affidavits as true, including all statements in those affidavits, our standard of review does not require that we accept a witness’ characterization of what “the facts” mean. Nor are we required to accept as facts statements not based on personal knowledge, such as those asserted by Mr. Brooks in his supplemental affidavit.

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all who profit from the existence of WDWCO, as one entity for purposes of personal jurisdiction.” This Court rejected that invitation, explaining that the Court “may not do so absent proof that the businesses are parts of the same whole.” *Id.* See also *Ash v. Burnham Corp.*, 80 N.C. App. 459, 462, 343 S.E.2d 2, 4 (“There is no evidence that [defendant] and the subsidiary are not separate and independent, and we thus determine that the subsidiary’s presence in this state is not to be considered as a basis for asserting jurisdiction over [defendant].”), *aff’d per curiam*, 318 N.C. 504, 349 S.E.2d 579 (1986).

Because SMIL has not made the showing required by *Wyatt* and *Ash* that would support treating BNPP France and BNPP Suisse collectively for purposes of the long-arm statute, we conclude that none of the evidence cited by SMIL constitutes solicitation for purposes of bringing BNPP Suisse within N.C. Gen. Stat. § 1-75.4(4)(a). Since SMIL has failed to establish a basis under the long-arm statute for North Carolina’s courts asserting jurisdiction over BNPP Suisse, we need not address whether exercising jurisdiction over BNPP Suisse would satisfy the requirements of due process under the Fourteenth Amendment. We hold that the trial court erred in concluding that it has personal jurisdiction over BNPP Suisse and, therefore, reverse.

Reversed.

Judges ROBERT C. HUNTER and STEPHENS concur.

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LILLIAN DENISE LUCAS, PLAINTIFF v. DELANO THADDEUS LUCAS, DEFENDANT

No. COA09-1004

(Filed 15 February 2011)

**1. Appeal and Error— interlocutory orders and appeals—final judgment—alimony and equitable distribution order—attorney fees remaining—not substantive**

An alimony and equitable distribution judgment was final and appeal was not from an interlocutory order even though attorney fees had not been determined. A claim for attorney fees under N.C.G.S. § 50-16.4 is not a substantive issue or in any way part of the merits of the claim.

**2. Divorce— alimony—marital misconduct—findings not sufficient**

An award of alimony was remanded for further findings regarding marital misconduct where the order and judgment did not specify the type of marital misconduct the court had found.

**3. Divorce— alimony—health insurance**

The trial court could include the maintenance of health insurance in an alimony award since health insurance is indistinguishable from other types of insurance that have been recognized as permissible forms of support and maintenance.

**4. Divorce— alimony—health insurance—findings**

An alimony award that included health insurance was remanded where the findings were not sufficient to allow the reviewing court to determine whether the trial judge exercised proper discretion.

**5. Divorce— alimony—duration—findings—not sufficient**

An alimony award was remanded for further findings regarding the duration of the payments and the health insurance coverage where the award was ambiguous as to termination and did not include findings explaining the reason for the duration chosen.

**6. Divorce— equitable distribution—unequal distribution—findings that equal division not equitable—not sufficient**

An equitable distribution judgment lacked adequate findings of fact where the trial court found that “an unequal distribution of marital property is equitable” rather than that “an equal division

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by using net value of marital property" is not equitable. In order to divide a marital estate other than equally, the trial court must first find that an equal division is not equitable and explain why.

**7. Divorce—equitable distribution—distribution amounts—not sufficient**

An equitable distribution award was remanded for further findings as to the distribution amounts where the appellate court had difficulty determining how the figures were derived.

Appeal by defendant from judgment entered 27 February 2009 by Judge Melinda H. Crouch in New Hanover County District Court. Heard in the Court of Appeals 9 March 2010.

*No brief filed on behalf of plaintiff-appellee.*

*John K. Burns for defendant-appellant.*

GEER, Judge.

Defendant Delano Thaddeus Lucas appeals from an equitable distribution and alimony order and judgment. This appeal demonstrates the importance of adequate findings of fact to permit proper appellate review. Without findings of fact setting out the basis for a trial court's decision, we are unable to determine whether that decision is supported by the evidence, whether it is consistent with the law, and whether it amounts to a reasonable exercise of the trial court's discretion. The order may be perfectly appropriate, but without proper findings of fact, we are not in a position to make that determination.

In this case, we hold, contrary to defendant's position, that the trial court could, as a general matter, properly include in an award of alimony a requirement that defendant provide plaintiff Lillian Denise Lucas with health insurance coverage. The trial court's order, however, failed to include any findings of fact to support that portion of its award. In addition, the trial court failed to make adequate findings of fact regarding (1) its determination that defendant engaged in marital misconduct and (2) the duration of the alimony payments. We similarly have concluded that the trial court's equitable distribution decision lacks adequate findings of fact to explain the basis for the trial court's distribution of assets and liabilities between the parties.

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We, therefore, reverse the order and judgment and remand for further findings of fact.

**Facts**

Plaintiff and defendant were married on 31 December 1986 and separated on 31 December 2006. On 13 May 2008, plaintiff filed a complaint for divorce from bed and board, postseparation support, alimony, equitable distribution, and attorneys' fees. A pretrial order was filed on 29 January 2009. As part of the pretrial order, the parties reached an agreement as to the value, classification, and distribution of most, but not all, of their marital property.

Following a hearing on 29 January 2009, at which the trial court considered the testimony, affidavits, and stipulations of the parties, as well as the pretrial order, the court made the following unchallenged findings of fact. Plaintiff, who has a high school diploma and completed one semester of college, worked for the Cumberland County School System for several years as a teacher's assistant and data manager making up to \$2,048.50 per month until 14 August 2006, when she was hospitalized for 12 days for a nervous breakdown and depression. Plaintiff continues to suffer from depression and receives treatment from psychiatrists, psychologists, and medical doctors for her mental condition and accompanying physical symptoms. She has been prescribed over a dozen medications for daily use to treat depression, anxiety, insomnia, itching, acid reflux, digestive conditions, headaches, allergies, and shaking.

Plaintiff had been treated for depression for approximately 10 years prior to the date of separation. The first onset of depression occurred at about the same time plaintiff discovered defendant was having affairs with other women. Subsequently, in 2006, plaintiff discovered emails defendant had sent to another woman expressing his love for that woman. Plaintiff also discovered that defendant had sent flowers to another woman, along with a note marking their nine-year anniversary.

Currently, plaintiff remains out of work, not having worked since her hospitalization. Plaintiff has been denied Social Security disability benefits. She lives with her mother, and her only sources of income since the date of separation have been unemployment benefits, babysitting money from her adult daughter (\$80.00 per week for six months), and \$10,000.00 in temporary disability benefits received in 2008. Plaintiff submitted an affidavit showing that her monthly living

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expenses are \$2,200.00 and that she was not receiving any income at the time of the hearing.

Defendant has worked for UPS as a driver for 39½ years and currently earns \$72,000.00 per year. In addition, he receives health insurance and pension contributions through his employment.

The court ultimately concluded that plaintiff is a dependent spouse and is actually substantially dependent on defendant for maintenance and support, while defendant is a supporting spouse pursuant to N.C. Gen. Stat. § 50-16.1A (2009). The court ordered that defendant pay plaintiff alimony in the amount of \$1,750.00 per month, as well as provide her with health insurance coverage.

With respect to equitable distribution, the trial court found that “an unequal distribution of marital property is equitable given the following distributional factors pursuant to [N.C. Gen. Stat. § 50-20(c) (2009)]: the income, property and liabilities of the parties; the duration of the marriage; the separate pensions of the parties; and the physical and mental health of the parties.” The decretal portion of the judgment stated that plaintiff “shall have and recover as part of her equitable share of the marital property and debts” marital assets in the amount of \$43,294.50 and marital liabilities in the amount of \$10,261.22, resulting in net marital property of \$33,033.28. The court provided that defendant’s equitable share of the marital property and debts included \$55,161.02 in marital assets and \$27,027.00 in marital liabilities. The order and judgment then erroneously recited that defendant was receiving \$30,134.02 in net marital property.

The judgment was entered on 27 February 2009. The order and judgment stated at the end: “This Order and Judgment is certified as a final judgment pursuant to rule 54(b) of the North Carolina Rules of Civil Procedure.” Defendant appealed to this Court on 30 March 2009.

Jurisdiction

[1] Although the judgment in this case resolved the claims for alimony and equitable distribution, it did not resolve plaintiff’s claim for attorneys’ fees. Given that the record on appeal indicates that the attorneys’ fees claim is still pending, we must, as an initial matter, address whether this appeal is interlocutory.

The trial court purported to certify the order and judgment for immediate appeal pursuant to Rule 54(b) of the Rules of Civil Procedure. Rule 54(b) provides, however, that “the court may enter a

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final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay *and it is so determined in the judgment.*" (Emphasis added.) In the absence of a specific finding that "there is no just reason for delay," this Court does not have jurisdiction to hear an interlocutory appeal under Rule 54(b). *See Cunningham v. Brown*, 51 N.C. App. 264, 266-67, 276 S.E.2d 718, 722 (1981) ("The order appealed from in the case *sub judice* does not state that the judge found no just cause for delay. Consequently, the order is not an immediately appealable 'final judgment' under Rule 54(b)[.]"). Some other basis must exist for appellate jurisdiction.

Previously, this Court has held that an appeal from an alimony order must be dismissed as interlocutory when there is still pending a claim for attorneys' fees. *See Webb v. Webb*, 196 N.C. App. 770, 774, 677 S.E.2d 462, 465 (2009). Our Supreme Court, however, in *Bumpers v. Cnty. Bank of N. Va.*, 364 N.C. 195, 202, 695 S.E.2d 442, 447 (2010), questioned *Webb*, which it described as following a case-by-case approach, and adopted a new rule for determining whether an appeal may proceed when the only remaining claim is one for attorneys' fees.

The Court specifically rejected the case-by-case approach in favor of a "bright-line rule": when a claim for attorneys' fees under a particular statute "is not a substantive issue, or in any way part of the merits" of the complaint, then finality of judgment is not precluded. *Id.* at 204, 695 S.E.2d at 448. In *Bumpers*, the Supreme Court addressed the propriety of an appeal from a judgment under N.C. Gen. Stat. § 75-1.1 (2009) (unfair and deceptive trade practices) while a claim remained pending for attorneys' fees under N.C. Gen. Stat. § 75-16.1 (2009). The Court held that because "a party must show that it has prevailed on the substantive claim under section 75-1.1, and that one of the two factors enumerated [in section 75-16.1] exists, . . . a claim for attorney fees under section 75-16.1 is not a substantive issue, or in any way part of the merits of a claim under section 75-1.1." *Bumpers*, 364 N.C. at 203-04, 695 S.E.2d at 448. Accordingly, under the Court's bright-line rule, a pending claim for attorneys' fees under § 75-16.1 does not preclude finality of a judgment resolving all substantive issues of a claim under § 75-1.1. *Bumpers*, 364 N.C. at 204, 695 S.E.2d at 448.

The attorneys' fees statute at issue in this case, N.C. Gen. Stat. § 50-16.4 (2009) (emphasis added), provides that "[a]t any time that a dependent spouse *would be entitled to alimony* pursuant to G.S. 50-16.3A, . . . the court may, upon application of such spouse, enter an

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order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony." *See also Caldwell v. Caldwell*, 86 N.C. App. 225, 227, 356 S.E.2d 821, 822 ("To recover attorney's fees pursuant to G.S. 50-16.4 in an action for alimony, the spouse must be entitled to the relief demanded . . . ."), *cert. denied*, 320 N.C. 791, 361 S.E.2d 72 (1987). Since a claim for attorneys' fees under § 50-16.4 is contingent upon the claimant prevailing on the alimony claim, we conclude, in accordance with *Bumpers*, that a § 50-16.4 claim "is not a substantive issue, or in any way part of the merits of a claim under" N.C. Gen. Stat. § 50-16.3A (2009). *Bumpers*, 364 N.C. at 204, 695 S.E.2d at 448.

Thus, an unresolved claim for attorneys' fees under N.C. Gen. Stat. § 50-16.4 does not preclude a determination of finality for a judgment resolving all substantive issues related to a claim for alimony or alimony together with equitable distribution. In this case, aside from the attorneys' fees issue, there were no unresolved substantive issues, and, therefore, the alimony and equitable distribution judgment was a final judgment, and this appeal is properly before the Court.

AlimonyA. Marital Misconduct

[2] We first address defendant's challenge to the trial court's conclusion that "an award of alimony is equitable considering all relevant factors including: the *marital misconduct* of the Defendant, relative earnings and earning capacity of the parties, the ages and physical, mental and emotional health of the parties and the length of the marriage (20 years)." (Emphasis added.) Defendant contends that the trial court erred in failing to specifically identify the nature of the misconduct and that, in any event, the evidence in this case did not support a finding of marital misconduct.

Under N.C. Gen. Stat. § 50-16.3A(a), "[t]he court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those set out in" N.C. Gen. Stat. § 50-16.3A(b). N.C. Gen. Stat. § 50-16.3A(b) provides that "[i]n determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including," among 16 specified factors, "marital misconduct of either of the spouses," N.C. Gen. Stat. § 50-16.3A(b)(1).

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“Marital misconduct,” in turn, is defined as “any” of a list of nine types of behaviors occurring “during the marriage and prior to or on the date of separation.” N.C. Gen. Stat. § 50-16.1A(3). The list includes “[i]lllicit sexual behavior,” defined as “acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in G.S. 14-27.1(4), voluntarily engaged in by a spouse with someone other than the other spouse.” N.C. Gen. Stat. § 50-16.1A(3)(a). It also includes “[i]ndignities rendering the condition of the other spouse intolerable and life burdensome.” N.C. Gen. Stat. § 50-16.1A(3)(f).

The order and judgment in this case does not specify what type of “marital misconduct” the trial court found had occurred. While defendant argues that the findings and evidence do not establish illicit sexual behavior, it may be that the trial court found the existence of indignities. We cannot determine the sufficiency of the evidence to support a finding of marital misconduct without knowing which form of marital misconduct the trial court believed occurred and the basic facts supporting that determination. *See Briggs v. Briggs*, 21 N.C. App. 674, 676, 205 S.E.2d 547, 549 (1974) (remanding where Court was “unable to determine by appellate review the basic facts upon which the trial court predicated its award”). Accordingly, we must reverse the award of alimony and remand for further findings of fact regarding the issue of marital misconduct.

**B. Health Insurance**

[3] Next, defendant challenges the portion of the alimony award requiring defendant to “continue to maintain health insurance coverage on” plaintiff. The decretal portion of the order and judgment provided that, “[a]s and in the nature of ALIMONY,” defendant “shall continue to maintain health insurance coverage on the Plaintiff and shall provide to her any and all information and documentation so as to enable her to submit claims on said insurance and/or receive payments and/or reimbursement from claims submitted to the insurance company by her or on her behalf.” Defendant first contends that such an award is not authorized by statute and that the trial court, therefore, exceeded its authority by making this award.

Under N.C. Gen. Stat. § 50-16.1A(a), alimony is defined as “an order for payment for the support and maintenance of a spouse or former spouse, periodically or in a lump sum, for a specified or for an indefinite term, ordered in an action for divorce, whether absolute or from bed and board, or in an action for alimony without divorce.” *See also Potts v. Tutterow*, 114 N.C. App. 360, 363, 442 S.E.2d 90, 92

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(1994) (“The purpose of alimony is to provide support and maintenance for the dependent spouse.”), *aff’d*, 340 N.C. 97, 455 S.E.2d 156 (1995). The question here is whether health insurance comes within the meaning of a payment for “support and maintenance” for purposes of N.C. Gen. Stat. § 50-16.1A(a) and § 50-16.3A(a).

Although our courts have not directly addressed this issue, in *Whedon v. Whedon*, 58 N.C. App. 524, 528, 294 S.E.2d 29, 32, *disc. review denied*, 306 N.C. 752, 295 S.E.2d 764 (1982), the trial court entered an alimony award that, in part, ordered the husband to transfer possession of one of his cars to the wife and ordered the husband to pay the wife’s automobile liability and collision insurance. On appeal, this Court rejected the husband’s challenge to the insurance payment requirement, holding: “The insurance payment was a proper incident of the sequestration of the automobile, which was entirely discretionary with the trial court.” *Id.* The Court also overruled the husband’s challenge to the portion of the order requiring him to pay the wife’s mortgage payments, ad valorem property taxes, and hazard insurance, “find[ing] no abuse of discretion in the requirement that [the husband] make the necessary mortgage, tax, and insurance payments on the house.” *Id.* at 529, 294 S.E.2d at 33 (emphasis added). Thus, according to *Whedon*, automobile and homeowner’s insurance payments are permissible as part of an alimony award.

Consistent with *Whedon*, *Lee’s North Carolina Family Law* explains that a trial court may award as alimony various types of payments, including insurance premiums:

The court’s decision to award title or possession of certain property may lead it to order other kinds of alimony as well. For example, a decision to order possession of the marital home may lead the court to order the supporting spouse to make the mortgage payments and pay property taxes; the decision to order possession of an automobile may lead the court to order the supporting spouse also to pay for liability and collision insurance as alimony.

2 Suzanne Reynolds, *Lee’s North Carolina Family Law* § 9.54, at 419 (5th ed. 1999).

Health insurance, we believe, is indistinguishable from other types of insurance recognized as permissible forms of support and maintenance. Since a trial court may order a supporting spouse to make homeowner’s and automobile insurance payments on behalf of a dependent spouse, even though such payments are not explicitly

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authorized under § 50-16.1A(a) or § 50-16.3A(a), we conclude that a court may also order a supporting spouse to pay for health insurance for a dependent spouse.

In support of his contention, defendant relies on *Michael v. Michael*, 198 N.C. App. 703, 681 S.E.2d 866, 2009 WL 2370613, \*5, 2009 N.C. App. LEXIS 1233, \*13 (Aug. 4, 2009) (unpublished), arguing that it “implies that the award of health insurance is something other than alimony.” Although *Michael*, as an unpublished opinion, is not controlling, we do not, in any event, agree with defendant’s reading of the opinion. In *Michael*, the parties had signed a “Separation and Property Settlement Agreement” in which the parties *waived alimony*. This Court simply affirmed the trial court’s order finding that the defendant’s obligation to provide for the plaintiff’s health insurance was *not* alimony, but, instead, was part of the parties’ property settlement. Nothing in *Michael* suggests that, in the absence of an agreement waiving alimony, a trial court is prohibited from ordering health insurance coverage as part of an alimony award.

Moreover, we note that this Court has, on occasion, affirmed alimony orders requiring health insurance payments without discussing whether those payments were authorized under N.C. Gen. Stat. § 50-16.1A(a) and § 50-16.3A(a). See *Ahern v. Ahern*, 63 N.C. App. 728, 728, 306 S.E.2d 140, 141 (1983) (affirming order “requiring plaintiff to pay \$2,141 a month and provide her with a car and medical insurance”); *Stickel v. Stickel*, 58 N.C. App. 645, 649, 294 S.E.2d 321, 324 (1982) (rejecting defendant’s argument that alimony findings of fact were inadequate to determine fairness of award that included homeowner’s insurance and medical insurance benefits).

**[4]** Defendant also argues that the trial court failed to include sufficient findings of fact supporting its order that defendant provide health insurance coverage to plaintiff. N.C. Gen. Stat. § 50-16.3A(c) provides that “[t]he court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment.” If the trial court “fail[s] to state any reason for the amount of alimony, its duration, or the manner of payment,” the order must be remanded. *Crocker v. Crocker*, 190 N.C. App. 165, 172, 660 S.E.2d 212, 217 (2008). See also *Hartsell v. Hartsell*, 189 N.C. App. 65, 76, 657 S.E.2d 724, 731 (2008) (remanding where court found “plaintiff had the ability to pay [\$650 monthly alimony] amount, but provided no explanation as to why it had concluded that defendant was entitled to that specific amount”);

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*Friend-Novorska v. Novorska*, 131 N.C. App. 867, 871, 509 S.E.2d 460, 462 (1998) (ordering trial court, on remand, to “make a new award of alimony and make specific findings justifying that award, both as to amount and duration”).

Here, on this issue, the trial court merely found that “defendant receives health insurance . . . through his employment.” While the language of the decretal portion of the order and judgment suggests that the trial court perhaps expected that plaintiff would simply remain on defendant’s UPS policy, defendant points out that if the parties divorce, plaintiff will no longer be covered as his spouse under his existing policy. The trial court made no findings of fact regarding, for example, the reason that plaintiff needed continued coverage; defendant’s ability to maintain plaintiff on his policy after the divorce; what should occur if defendant is unable to maintain plaintiff on his policy; the cost of maintaining plaintiff on the policy or of providing alternative coverage; whether plaintiff would be able to obtain coverage if not covered under defendant’s plan; what type of coverage would need to be provided; and whether defendant could afford to provide alternative coverage.

The trial court’s findings are thus “too meager to enable the reviewing court to determine whether the trial judge exercised proper discretion in deciding what defendant was to pay plaintiff, and . . . the findings which were made do not support the judgment.” *Tan v. Tan*, 49 N.C. App. 516, 523, 272 S.E.2d 11, 16 (1980), *disc. review denied*, 302 N.C. 402, 279 S.E.2d 356 (1981). “Without more definite findings on these matters, we are unable to determine whether the judgment is fair to all parties concerned.” *Id.*

Consequently, while we hold that the trial court could properly decide to include health insurance coverage in the alimony award, its findings of fact are inadequate to support its award. We, therefore, must also reverse this provision in the alimony award and remand for further findings of fact regarding the requirement that defendant “continue to maintain health insurance coverage on the Plaintiff . . .”

**C. Alimony Termination Provisions**

[5] Defendant also challenges the termination provisions included in the decretal portion of the order and judgment. Under the heading of “Termination Events,” the judgment provides: “Defendant’s obligations for the payment of alimony shall terminate upon the occurrence of a statutory event as noted in NCGS 50-16.9. Defendant’s obligation

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for the maintenance of Plaintiff's health insurance shall continue until the first occurrence of: (a) Plaintiff receives Social Security disability and Medicare; or (b) Plaintiff becomes gainfully employed and has health insurance available to her through employment."

We first note that this "Termination Events" portion of the decree is ambiguous. We are unable to understand how the trial court intended the alimony award to terminate in this case. Since the trial court referred to the health insurance payments as "in the nature of ALIMONY," the judgment could be read as terminating the health insurance upon the occurrence of the events specified in N.C. Gen. Stat. § 50-16.9(b) (2009) (providing that alimony "shall terminate" upon remarriage or cohabitation of dependent spouse or upon death of either supporting or dependent spouse). On the other hand, the sentence specifically addressing health insurance could require continuation of health coverage even upon the occurrence of a circumstance set out in N.C. Gen. Stat. § 50-16.9. Although defendant argues that the trial court improperly attempted to exempt health insurance coverage from N.C. Gen. Stat. § 50-16.9, we do not believe that the trial court necessarily had that intent. The alimony award must be clarified to specify when the obligation to provide health insurance terminates.

In addition, this Court has repeatedly held that an alimony order is inadequate when it contains no findings explaining the reason for the duration chosen—in this case, findings explaining why the trial court believed it necessary to continue alimony until the occurrence of the events set out in N.C. Gen. Stat. § 50-16.9. *See Hartsell*, 189 N.C. App. at 76-77, 657 S.E.2d at 731 (remanding where trial court ordered alimony to continue until death or remarriage of defendant but "included no findings of fact at all to explain its rationale for the duration of the award"); *Squires v. Squires*, 178 N.C. App. 251, 264, 631 S.E.2d 156, 163 (2006) (remanding for further findings of fact concerning duration of alimony award where court ordered alimony to "continue until the death of one of the parties, or plaintiff's remarriage or cohabitation, but failed to make any finding about the reasons for this duration"); *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421-22, 588 S.E.2d 517, 523 (2003) (remanding where court "did not make required findings as to the reasons for making the duration of the alimony continuous until defendant dies, remarries, or cohabits"). We must, therefore, also remand for findings of fact regarding the reason for the duration of the \$1,750.00 monthly payments and health insurance coverage.

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Equitable Distribution

[6] We also agree with defendant that the equitable distribution judgment lacks adequate findings of fact. After making findings about various specific pieces of property, the trial court found “that an unequal distribution of marital property is equitable given the following distributional factors pursuant to [N.C. Gen. Stat. §] 50-20(c): the income, property and liabilities of the parties; the duration of the marriage; the separate pensions of the parties; and the physical and mental health of the parties.” Based on this finding, the court then concluded that “[e]vidence received by the court concerning the distributional factors justify [sic] the equitable division and distribution set forth below in the decadal portion.”

In the decadal portion, the court incorporated by reference the parties’ inventory of marital property and debts “as to the classification, value and distribution of marital property except as specifically modified in this order by the court.” The court then provided that plaintiff’s “equitable share of the marital property and debts” was \$43,294.50 in marital assets and \$10,261.22 in marital liabilities, for a net of \$33,033.28 in marital property. The court provided that defendant’s “equitable share of the marital property and debts” was \$55,161.02 in marital assets and \$27,027.00 in marital liabilities, for, according to the order and judgment, a net of \$30,134.02 in marital property. It appears that there was an error in subtraction, and the correct net marital property figure for defendant should have been \$28,134.02.

As an initial matter, the equitable distribution portion of the order and judgment does not appear to comply with N.C. Gen. Stat. § 50-20(c) (2009). N.C. Gen. Stat. § 50-20(c) provides that “[t]here shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably” after considering 12 factors. Here, the trial court found that “an unequal distribution of marital property is equitable” rather than that “an equal division by using net value of marital property” is not equitable.

We do not believe that this difference is a matter of semantics. Rather, as our Supreme Court explained in *White v. White*, 312 N.C. 770, 776-77, 324 S.E.2d 829, 832-33 (1985) (emphasis original):

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The trial court in the present case indicated that “pursuant to G.S. 50-20, an equal division of the marital property of the parties is presumed appropriate.” The statute in fact does more. It does not create a “presumption” in any of the senses that term has been used to express “the common idea of assuming or inferring the existence of one fact from another fact or combination of facts.” 2 Brandis on North Carolina Evidence, § 215 (2d ed. 1982). Instead, the statute is a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made *mandatory* “unless the court determines that an equal division is not equitable.” N.C.G.S. 50-20(c). The clear intent of the legislature was that a party desiring an unequal division of marital property bear the burden of producing evidence concerning one or more of the twelve factors in the statute and the burden of proving by a preponderance of the evidence that an equal division would not be equitable. Therefore, if no evidence is admitted tending to show that an equal division would be inequitable, the trial court *must* divide the marital property equally.

When evidence tending to show that an equal division of marital property would not be equitable is admitted, however, the trial court must exercise its discretion in assigning the weight each factor should receive in any given case. It must then make an equitable division of the marital property by balancing the evidence presented by the parties in light of the legislative policy which favors equal division.

Consequently, in order to divide a marital estate other than equally, the trial court must first find that an equal division is not equitable and explain why. Then, the trial court must decide what is equitable based on the factors set out in N.C. Gen. Stat. § 50-20(c)(1)-(12) after balancing the evidence in light of the policy favoring equal division.

Given the language of the trial court’s order, we cannot be assured that the trial court gave proper consideration to the policy favoring an equal division of the estate. On remand, the trial court must make the determinations required by N.C. Gen. Stat. § 50-20(c) and *White*. This remand does not mean that the trial court’s ultimate decision was in error—we simply need to have an order demonstrating consideration of the policies and factors established by the General Assembly.

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[7] Perhaps because of the trial court's failure to precisely follow the statute, the order and judgment is unclear as to how the trial court decided upon its distribution or why this particular distribution was in fact equitable. First, we have had difficulty determining how the figures were derived. With respect to the marital assets, the trial court accepted defendant's figure regarding the value of assets allocated to him. With respect to plaintiff's marital assets, however, the court valued those assets at \$43,294.50, even though the parties had both agreed that the value of the assets distributed to plaintiff is \$42,344.50. There is a difference of \$50.00 not accounted for.

In addition, the order and judgment appears to conclude that a 52%/48% split (using the trial court's exact numbers) or a 54%/46% split (after correcting the subtraction error) is equitable. As defendant points out, however, that is not actually what the trial court did.

The trial court found—contrary to defendant's contention but consistent with the pretrial order—that an IRA account valued at \$42,924.54 was marital property and not defendant's separate property. The court further found that the funds in that account were used to pay off marital debt, although the finding does not specify the amount of the debt paid. There are no findings as to whether the entire value of the account was exhausted by marital debt, taxes, and penalties; whether some of the funds were used for some other purpose as well; or whether some amount remained. The court then found that “the use of these marital funds to pay off the joint marital debts should be reflected as the parties each being assigned one half of those marital liabilities which is consistent with the contentions of the Plaintiff.”<sup>1</sup>

The trial court did not make a specific finding as to who would be awarded the IRA marital property. We can deduce from the parties' inventory that the IRA was awarded to defendant—both parties distributed the IRA to defendant. The trial court's decree also incorporated that inventory by reference except as modified by the order. The court's order does not, however, contain any explanation regard-

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1. Although the trial court's order implies that the marital debt paid with the IRA funds and divided equally between the parties totaled \$20,522.44, the record suggests that the total amount of debt paid off with the IRA funds was \$29,000.00. The order, however, contains no findings reconciling this difference. If the roughly \$8,500.00 debt not accounted for represented separate debt of either party, that could be relevant to the distribution of the IRA funds. Without findings of fact specifically addressing what happened with the IRA, we cannot know for sure.

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ing why the trial court decided to distribute the IRA to defendant when at least part of it had been exhausted by marital debt and then to split the marital debt between the parties. By doing so, the trial court's order makes it appear as if defendant is receiving the benefit of \$55,161.02 in marital assets, when \$42,924.54 (or 78%) of those assets are the IRA, which has been at least partially exhausted by marital debt.

Defendant argues, therefore, that the nature of the division of property and assets is more unequal than appears on the face of the order. Defendant contends that “[t]he result was an award to Plaintiff of a net amount with an actual value of \$43,294.50, or about 71% of the total marital assets; and an award to Defendant of a net amount with an actual value of \$17,842.79, or about 29% of the total.” The trial court's order does not address this issue or explain why it viewed this result—assuming without deciding that it is correct mathematically—as equitable.

We must, therefore, also remand for further findings of fact as to the basis for the distribution amounts. See *Vadala v. Vadala*, 145 N.C. App. 478, 480, 550 S.E.2d 536, 538 (2001) (remanding for further findings of fact when trial court made finding as to amount of plaintiff's income, but gave “no indication as to how [plaintiff's income] was calculated” and Court, therefore, could not “confirm or deny this finding”).

We do not address defendant's contention that the award of marital debt, already paid, to plaintiff was “an unwarranted windfall.” We cannot determine whether this approach is reasonable or supported by the law and the evidence until we know the basis for the trial court's decision. As N.C. Gen. Stat. § 50-20(j) mandates, “[i]n any order for the distribution of property made pursuant to this section, the court shall make written findings of fact that support the determination that the marital property and divisible property has been equitably divided.”

Conclusion

We must reverse and remand the Equitable Distribution and Alimony Order and Judgment for further findings of fact. With respect to the award of alimony, the trial court shall, on remand, make further findings of fact regarding the health insurance coverage, marital misconduct, the duration of the alimony, and the “Termination Events.” As for equitable distribution, the trial court shall on remand make

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additional findings as required by N.C. Gen. Stat. § 50-20(c) and (j) and sufficient findings to explain the basis for the court's division of the property and the liabilities.

Reversed and remanded.

Judges McGEE and ERVIN concur.

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IN THE MATTER OF: RONALD WATSON

No. COA10-365

(Filed 15 February 2011)

**1. Appeal and Error— mootness—involuntary commitment order**

The validity of an involuntary commitment order was not moot on appeal even though the commitment term had passed because the order could result in collateral legal consequences.

**2. Mental Illness— involuntary commitment hearing—waiver of counsel**

Respondent's waiver of counsel at an involuntary commitment hearing was ineffective, and the resulting commitment order was vacated, where the trial court did not comply with the statutory mandates of N.C.G.S. § 15A-1242, N.C.G.S. § 122C-168(d), and IDS Rule 1.6. There was nothing in the record indicating that the trial court conducted a thorough inquiry that showed that defendant was literate and competent, the facts should have caused the trial court to question whether to preclude self-representation for respondent, and there was nothing in the record to indicate a thorough inquiry that showed that respondent understood and appreciated the consequences of his decision, the nature of the proceedings, and the commitment he was facing.

Appeal by respondent from order entered 1 August 2008 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 29 September 2010.

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*Attorney General Roy Cooper, by Assistant Attorney General Susannah B. Cox, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for respondent-appellant.*

CALABRIA, Judge.

Ronald Watson (“respondent”) appeals an involuntary commitment order requiring him to be committed to Central Regional Hospital (“Central”) for inpatient treatment for a period of thirty days, to be followed by outpatient treatment for sixty days. Respondent argues that the trial court erred by allowing him to represent himself at the involuntary commitment hearing or, in the alternative, the trial court erred by failing to conduct the statutorily required inquiry necessary to assure that his waiver of his constitutional right to counsel was knowing, intelligent and voluntary. We agree and vacate the trial court’s order and remand this matter to the trial court for a new hearing.

**I. BACKGROUND**

On 22 July 2008, Dr. Seth Glickman (“Dr. Glickman”) of Duke University Health System (“Duke”) filed an Affidavit and Petition for an involuntary commitment. Specifically, Dr. Glickman requested a court order for a law enforcement officer to take respondent into custody for examination, alleging that respondent was mentally ill and dangerous to himself or others or mentally ill and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness. Dr. Glickman examined respondent after Dr. Matthew Conner had assessed respondent and noted that respondent had been pacing and refused medication. Dr. Glickman found the following pertinent facts:

[Respondent] . . . was brought . . . by police secondary to reported agitation and violence at the home of his parents where he lives. At this time, patient is grossly psychotic with significant paranoia. He requires inpatient psychiatric hospitalization and stabilization.

Dr. Glickman recommended a three day inpatient commitment at Central to determine whether respondent was mentally ill and

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dangerous to himself or others. That same day, in Durham County District Court, the court filed a “Findings and Custody Order: Involuntary Commitment,” finding that there were reasonable grounds to believe that the facts alleged in the petition were true and that respondent was probably mentally ill and dangerous to himself or others or mentally ill and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness. The court ordered law enforcement officers to transport respondent directly to Central for temporary custody, examination and treatment pending a district court hearing.

At 10:00 a.m. on 22 July 2008, respondent was examined by Dr. David Novosad (“Dr. Novosad”), a psychiatric resident at Central. As a result of the examination, Dr. Novosad concluded that respondent was mentally ill and dangerous to himself and others. In his report, Dr. Novosad stated that respondent had “significant paranoia,” that respondent’s “current mental status or the nature of his illness limits or negates his/her ability to make an informed decision to seek treatment voluntarily or comply with recommended treatment,” and that respondent “believes the legal system is ‘out to get him.’” Dr. Novosad diagnosed respondent with “psychosis NOS”<sup>1</sup> and recommended a thirty-day inpatient commitment and sixty-day outpatient commitment.

On 1 August 2008, a hearing was scheduled in Durham County District Court. Prior to the hearing, respondent asked the trial court who would serve as his court-appointed counsel. The trial court replied, “That guy right there.” Respondent stated that he had not been introduced to counsel and the trial court granted respondent five minutes to meet with him. After speaking with respondent, counsel told the trial court, “He wants to represent himself[,]” and “wants me to just assist him.” Counsel told the court that he advised respondent against proceeding *pro se*, but stated, “if you don’t mind, I’ll stand in for him.” The trial court responded, “All right. Go ahead.” The trial court then proceeded with the hearing without further discussion.

At the hearing, Dr. Novosad testified as an expert in mental health and psychosis. Dr. Novosad stated that he examined respondent on 21 July 2008. Dr. Novosad also testified that respondent lives with his parents and has lived with them for the past forty-eight years of his life. He became upset with his brother who was visiting and kicked a

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1. “NOS” stands for “Not Otherwise Specified.”

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wall at his parents' home. Prior to this incident, respondent had never been treated for any kind of psychotic disorder. According to Dr. Novosad, respondent: (1) had "been increasingly involved with the legal system;" (2) reported that "he's been suffering some legal injustices;" (3) was concerned that he was being "mistreated;" (4) had become "more aggressive at home;" and (5) used marijuana "on a regular basis." Dr. Novosad concluded that respondent has "significant" paranoia and "psychotic disorder not otherwise specified," with a possibility that respondent suffers from schizophrenia.

While respondent was in Dr. Novosad's care, respondent received the medication Haloperidol, an antipsychotic medication commonly used for patients with psychotic disorder. Since respondent refused to take the medication orally, Dr. Novosad concluded that, based on respondent's condition, respondent required the use of forced medication. Dr. Novosad reported that while respondent was on the medication, he was "behaviorally appropriate . . . [and did] not cause[] any disturbances on the ward," and was "compliant with the ward routine" other than taking his medication orally. Dr. Novosad stated that if respondent complied by taking his medication orally, it would be appropriate to discharge him from the hospital.

Dr. Novosad further stated that he was concerned for respondent because respondent denied having a psychiatric problem and needing medication, and would not take his medication orally if discharged from the hospital. Dr. Novosad explained the risks if respondent would not take his medication orally: "[t]he paranoia and the aggressive behavior at home would . . . worsen, and he would be a . . . risk of danger to . . . himself or others." Dr. Novosad recommended a thirty-day commitment for inpatient care with a sixty-day outpatient mental health commitment to address the issue of respondent's psychotic disorder and medication compliance. Dr. Novosad concluded that respondent needed inpatient commitment because "outside the hospital, there's no way that we could monitor whether he takes his medication . . .".

Following respondent's cross-examination, respondent attempted to testify. During respondent's oath to tell the truth, respondent interrupted the court twice and ordered the trial court to "redo" the oath. Respondent then testified that his brother visited the home two weeks ago and they argued about turning down the music.

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Respondent claimed that he had “just done six-and-a-half months in Durham County Jail for failure to be notified, not failure to appear, as was claimed.” He also claimed that courthouse officers beat him, broke his ribs, and slammed his head on the floor. Therefore, he was “going to sue” Durham County for “brutality” and “false arrest.” Respondent said he was “stressed out” because “Durham County Court is corrupt.” Respondent stated that during his prior court appearances, “I was in there representing myself. I had assistant counsel, just like I do today.” Respondent added, “I do not want this case dismissed because I was trying to save a woman’s life . . . a convicted felon for . . . conspiring to traffic cocaine. She’s a junkie now, and she asked for my assistance to get off of it.” Respondent claimed that after eight months of trying to help this woman, that he “got death threats through gunshots around my house.”

Respondent further stated that every evening since he was in the hospital, he was forced to receive injections “through a . . . long needle in the butt,” that he was “in pain every day, . . . and all I got is a doctor that wants to keep me in—keep himself in business by keeping me in—in a—in a hospital.” He claimed he was “completely sane” and that he was “threatened by the doctors at Duke University . . . to either give a blood and urine sample or that [he] would be restrained . . . shot with a narcotic and . . . a . . . catheter stuck up [his] penis . . .” Respondent asked the court to “be set free . . . and if you don’t set me free, I would rather be in jail then [sic] in a hospital that forces medication on me.”

The trial court found that respondent was represented by counsel, and found by clear, cogent and convincing evidence that respondent was “grossly psychotic with significant paranoia, has exhibited aggressive behavior at home to parents [and] brother, has kicked hole in wall at home, [and] has refused meds.” Based on these findings, the trial court concluded that respondent was mentally ill and a danger to himself and others. The trial court ordered respondent committed for thirty days of inpatient care at Central, to be followed by sixty days of outpatient care.

Respondent then asked the trial court if the time period of inpatient commitment was three days. When the trial court responded that the period was thirty days, respondent stated, “F[] this court!” ten times then added, “I’m not violent!” as he was carried out of the courtroom.

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On 29 August 2008, respondent filed a written notice of appeal, but did so in the wrong court. On 14 October 2009, respondent petitioned this Court for writ of *certiorari*, and we granted respondent's petition on 28 October 2009. On 16 December 2009, the trial court entered an order finding respondent indigent and appointing the Office of the Appellate Defender to represent respondent.

**II. STANDARD OF REVIEW**

On appeal of a commitment order[,] our function is to determine whether there was any competent evidence to support the "facts" recorded in the commitment order and whether the trial court's ultimate findings of mental illness and dangerous[ness] to self or others were supported by the "facts" recorded in the order. *In re Underwood*, 38 N.C. App. 344, 347-48, 247 S.E.2d 778, 781 (1978); *In re Hogan*, 32 N.C. App. 429, 433, 232 S.E.2d 492, 494 (1977). We do not consider whether the evidence of respondent's mental illness and dangerousness was clear, cogent and convincing. It is for the trier of fact to determine whether the competent evidence offered in a particular case met the burden of proof. *In re Underwood*, *supra*, at 347, 247 S.E.2d at 781.

*In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980) (italics omitted).

**III. INITIAL MATTER—MOOTNESS**

[1] As an initial matter, we address whether respondent's appeal is moot.

Usually, when the terms of a challenged trial court judgment have been carried out, a pending appeal of that judgment is moot because an appellate court decision "cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996). In certain cases, however, the continued existence of the judgment itself may result in collateral legal consequences for the appellant. See, e.g., *In re Hatley*, 291 N.C. 693, 694-95, 231 S.E.2d 633, 634-35 (1977) (involuntary commitment order); *Smith ex rel. Smith v. Smith*, 145 N.C. App. 434, 436-37, 549 S.E.2d 912, 913-14 (2001) (domestic violence protective order). Possible adverse consequences flowing from a judgment preserve an appellant's substantial stake in the outcome of the case and the validity of the challenged judgment continues to be a "live" controversy. As a result, an appeal from a judgment which creates possible

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collateral legal consequences for the appellant is not moot. *Hatley*, 291 N.C. at 694, 231 S.E.2d at 634.

*In re A.K.*, 360 N.C. 449, 452-53, 628 S.E.2d 753, 755 (2006).

In the instant case, respondent was committed on 1 August 2008 to an inpatient facility for thirty days followed by sixty days of outpatient care. Respondent's appeal was heard by this Court on 29 September 2010. However, since the trial court's order may result in collateral legal consequences for respondent, the validity of the challenged order continues to be a live controversy. Therefore, respondent's appeal is not moot.

**IV. WAIVER OF COUNSEL**

[2] Respondent argues that the trial court erred by allowing him to represent himself at the district court hearing because the commitment statutes do not allow a respondent facing involuntary commitment to represent himself, or in the alternative, that the trial court erred by (1) not making the required findings that he was acting with full awareness of his rights and the consequences of his waiver, (2) not inquiring into his mental condition or the complexity of the matter before allowing him to waive his right to counsel, and (3) not acquiring such waiver of counsel in writing. We agree.

N.C. Gen. Stat. § 122C-268 (2008), which governs inpatient commitments, states in pertinent part:

The respondent *shall* be represented by counsel of his choice; or if he is indigent within the meaning of G.S. 7A-450 or refuses to retain counsel if financially able to do so, he *shall* be represented by counsel appointed in accordance with rules adopted by the Office of Indigent Defense Services.

N.C. Gen. Stat. § 122C-268(d) (emphases added).

"This Court has held that use of the language 'shall' is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error." *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001). "Where the language of a statute is clear, the courts must give the statute its plain meaning[.]" *Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009).

The language of N.C. Gen. Stat. § 122C-268(d) is clear. A person facing involuntary commitment must be represented by counsel of

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his choice, and if he is indigent, he must be represented by counsel appointed in accordance with the rules adopted by the Office of Indigent Defense Services (“IDS Rules”).

Rule 1.6 of the IDS Rules, titled “Waiver of Counsel,” states:

An indigent person who has been informed of his or her right to be represented by counsel at any in-court-proceeding may, in writing, waive the right to in-court representation by counsel. Any such waiver of counsel *shall* be effective *only if* the court finds of record that at the time of waiver the indigent person acted with full awareness of his or her rights and of the consequences of the waiver. In making such a finding, the court *shall* follow the requirements of G.S. 15A-1242 and *shall* consider, among other things, such matters as the person’s age, education, familiarity with the English language, mental condition, and the complexity of the matter.

IDS Rule 1.6 (2008) (emphases added).

N.C. Gen. Stat. § 15A-1242 (2008) states:

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant: (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled; (2) Understands and appreciates the consequences of this decision; and (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2008).

While our courts have previously held that the protections afforded by N.C. Gen. Stat. § 15A-1242 are mandatory in the context of criminal proceedings, *State v. Pruitt*, 322 N.C. 600, 369 S.E.2d 590 (1988), we have not addressed whether they are mandatory in the context of involuntary commitment proceedings. “Although a civil commitment proceeding cannot be equated to a criminal prosecution, the standards in criminal cases have been examined to determine when waiver [of counsel] can occur.” *In re Jesse M.*, 217 Ariz. 74, 78, 170 P.3d 683, 687 (2007) (internal quotations and citations omitted); *see also Matter of S.Y.*, 162 Wis.2d 320, 469 N.W.2d 836 (1991).<sup>2</sup>

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2. We note that the commentary to IDS Rule 1.6 implies “that in some circumstances a person may lack the capacity to waive counsel. For example, N.C. Gen. Stat.

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Our Supreme Court has held that in criminal cases, “ ‘[b]efore allowing a defendant to waive in-court representation by counsel . . . the trial court must insure that constitutional and statutory standards are satisfied.’ ” *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008) (quoting *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992)). “Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court . . . must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel.” *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476 (citations omitted). “[T]he record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will.” *State v. Thacker*, 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980).

In order to determine whether the defendant’s waiver meets this constitutional standard, the trial court must conduct a thorough inquiry, and perfunctory questioning is not sufficient. *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476. “A trial court’s inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242.” *Moore*, 362 N.C. at 322, 661 S.E.2d at 724 (citation omitted). The trial court’s inquiry under N.C. Gen. Stat. § 15A-1242 “is mandatory and failure to conduct such an inquiry is prejudicial error.” *Pruitt*, 322 N.C. at 603, 369 S.E.2d at 592.

“[T]he United States Constitution permits judges to preclude self-representation for defendants adjudged to be ‘borderline-competent’ based on a ‘realistic account of the particular defendant’s mental capacities . . . .’ ” *State v. Lane*, 362 N.C. 667, 668, 669 S.E.2d 321, 322 (2008) (quoting *Indiana v. Edwards*, 554 U.S. 164, —, 128 S. Ct. 2379, 2387-88, 171 L. Ed. 2d 345, 357 (2008)), clarified, 363 N.C. 121, —, — S.E.2d —, and motion granted, — N.C. —, 685 S.E.2d 514 (2009), motion denied, 364 N.C. 329, 701 S.E.2d 245 (2010). Furthermore, “[i]t is the trial court’s duty to conduct the inquiry of defendant to ensure that defendant understands the consequences of his decision.” *Pruitt*, 322 N.C. at 604, 369 S.E.2d at 593.

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§ 122C-268(d) provides that in cases in which a person is alleged to be mentally ill and subject to in-patient commitment, counsel shall be appointed if the person is indigent or refuses to retain counsel although financially able to do so.” IDS Rule 1.6, Commentary. Other jurisdictions prohibit a respondent from proceeding *pro se* at an involuntary commitment proceeding. See *In re L.K.*, 353 Mont. 246, 249, 219 P.3d 1263, 1265 (2009); *In re Penelope W.*, 977 A.2d 380, 382 (Me. 2009).

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Moreover, “‘neither the statutory responsibilities of standby counsel, N.C.G.S. § 15A-1243, nor the actual participation of standby counsel . . . is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver.’” *Pruitt*, 322 N.C. at 603, 369 S.E.2d at 592 (quoting *State v. Dunlap*, 318 N.C. 384, 389, 348 S.E.2d 801, 805 (1986)).

While the above-stated cases are criminal cases and not cases of involuntary commitment, we hold that the protections afforded by N.C. Gen. Stat. § 15A-1242, N.C. Gen. Stat. § 122C-268(d), and IDS Rule 1.6 are mandatory in involuntary commitment proceedings and that the rationale from the above-cited cases also applies to cases of involuntary commitment.

Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in *parens patriae*, it has the inescapable duty to vouchsafe due process, and this necessarily includes the duty to see that a subject of an involuntary commitment proceedings is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf.

*Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968); *Johnson v. Solomon*, 484 F. Supp. 278, 286 (D. Md. 1979); *Towne v. Hubbard*, 3 P.3d 154, 159 n.18 (Okla. 2000); *Honor v. Yamuchi*, 307 Ark. 324, 329, 820 S.W.2d 267, 270 (1991); *Perry v. Banks*, 521 S.W.2d 549, 554 (Tenn. 1975); *In re Fisher*, 39 Ohio St. 2d 71, 77, 313 N.E.2d 851, 855-56 (1974). See also *In re Det. of J.S.*, 138 Wn. App. 882, 895, 159 P.3d 435, 442 (2007); *In Interest of R.Z.*, 415 N.W.2d 486, 488 (N.D. 1987); *State v. Collman*, 9 Ore. App. 476, 483, 497 P.2d 1233, 1236 (1972); Brunetti, *The Right to Counsel, Waiver Thereof, and Effective Assistance of Counsel in Civil Commitment Proceedings*, 29 S.W.L.J. 684, 711-12 (1975).

In the instant case, just prior to the hearing, the trial court engaged in the following colloquy with respondent:

[Respondent]: Uh, excuse me; uh . . . I - I want to - to know who's - who's s - supposedly representing me.

The Court: That guy right there.

Unknown: Raise your right ha -

[Respondent]: Well, I haven't even been *introduced* to him yet. (background) Can't - can't I even speak to him before a trial starts?"

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Subsequently, the trial court engaged in the following conversation with respondent's appointed counsel:

The Court: Do you want a couple of minutes? (background)

The Court: (*louder*) Do you want a couple of minutes, Mr. Perry?

Mr. Perry: Just five minutes.

The Court: That's fi-, that's fine. That'll be fine! You can come down. You-you're sworn in, but you can be at ease. We're going to pause for-for a few minutes. That's fine.

(pause)

(background)

The Court: All right. Let's get started. Now, you've got the doctor, he's been sworn in (INAUDIBLE) or?

Mr. Perry: Your Honor, uh, my client wants me to just assist him. He wants to represent himself. But, if you don't mind, I will - I advised him against it, but if you don't mind, I'll stand in for him.

The Court: All right. Go ahead.

Mr. Perry: All right. Thank you.

The Court: He'll be sitting there, but go ahead and —

There is nothing in the record indicating that the trial court conducted a thorough inquiry that showed that respondent was literate. In addition, there is nothing in the record indicating that the trial court conducted a thorough inquiry that showed that respondent was competent. The trial court's determinations of competency to waive counsel may be "based on observation of the defendant *during the proceedings.*" *United States v. Vamos*, 797 F.2d 1146, 1150 (2d Cir. 1986) (emphasis added).

At the hearing in the instant case, the trial court had before it the Affidavit and Petition for Involuntary Commitment, which stated that respondent was "mentally ill and dangerous to himself or others or mentally ill and in need of treatment in order to prevent future disability or deterioration that would predictably result in dangerousness." The Affidavit and Petition also stated that respondent was "grossly psychotic with significant paranoia" and required "inpatient psychiatric hospitalization and stabilization."

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During the hearing, Dr. Novosad testified that respondent was refusing his medication and that if respondent did not comply by taking his medication, his paranoia and aggressive behavior would worsen, and he would be a risk of danger to himself or others. While respondent was initially sworn in without incident regarding whether he had an opportunity to meet his court-appointed counsel, in his subsequent swearing-in prior to his testimony, respondent engaged in a belligerent exchange with the trial court over his oath, and ordered the trial court to “redo it.” After respondent was sworn in for the second time, he delivered his testimony in a rambling narrative, accusing the court of being corrupt and law enforcement officers of police brutality, claiming to have received death threats and gunshots at his home because he was helping a woman get off drugs, and alleging he was threatened by hospital doctors. At the conclusion of the hearing, the trial court concluded that respondent was mentally ill and was dangerous to himself and others, and ordered him committed to Central for thirty days of inpatient care.

While the trial court was in the best position to determine respondent’s capacity to waive counsel, these facts should have caused the trial court to question whether to preclude self-representation for respondent in this case based on a realistic account of his mental capacities. *Lane*, 362 N.C. at 668, 669 S.E.2d at 322.

Additionally, there is nothing in the record indicating that the trial court conducted a thorough inquiry that showed that respondent understood and appreciated the consequences of his decision or comprehended the nature of the proceedings and the length or type of commitment he was facing. See *Dunlap*, 318 N.C. at 389, 348 S.E.2d at 804; see also *Eckroth v. B.L.S.*, 721 N.W.2d 50, 53 (N.D. 2006) (“[I]n order to establish a proper waiver of counsel in a mental health proceeding, the district court must engage in a colloquy on the record, which must mirror the record in a waiver of counsel in the criminal context. Absent such evidence on the record, a respondent in an involuntary commitment proceeding cannot represent himself.”) (internal citations omitted).

The trial court did not make sure respondent was acting with full awareness of his rights, nor did it conduct a thorough inquiry as required by N.C. Gen. Stat. § 15A-1242. The trial court did not ask or consider respondent’s age, education, mental condition, or the complexity of the proceeding. During the colloquy with the trial court, respondent’s appointed counsel, not respondent, stated that respon-

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dent “wants to represent himself,” even though counsel “advised him against it.” This is insufficient to show compliance with N.C. Gen. Stat. § 15A-1242. *See Moore*, 362 N.C. at 322, 661 S.E.2d at 724 (suggesting that it is error for the trial court to “defer[] to defendant’s assigned counsel to provide defendant with adequate constitutional safeguards” rather than conduct “the appropriate inquiry mandated by N.C.G.S. § 15A-1242”); *accord Pruitt*, 322 N.C. at 604, 369 S.E.2d at 593 (“Having a bench conference with counsel is insufficient to satisfy the mandate of [N.C. Gen. Stat. § 15A-1242].”).

The State argues that respondent “had the assistance of counsel at [the] hearing” as required by N.C. Gen. Stat. § 122C-268(d). We disagree.

In the involuntary commitment order, the trial court found that respondent was represented by counsel. However, there is no competent evidence in the record to support this finding. Mr. Perry clearly notified the court that while he advised respondent against proceeding *pro se*, he would “stand in for him.” The trial court then responded, “All right. Go ahead.” We reiterate that “neither the statutory responsibilities of standby counsel, N.C.G.S. § 15A-1243, nor the actual participation of standby counsel . . . is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver.” *Pruitt*, 322 N.C. at 603, 369 S.E.2d at 592 (quoting *State v. Dunlap*, 318 N.C. 384, 389, 348 S.E.2d 801, 805 (1986)).

Furthermore, the trial court’s instruction to respondent that his appointed counsel would “be sitting there” is not sufficient to satisfy the statutory mandate that the court must make a “thorough inquiry” to satisfy itself that the defendant “comprehends the nature of the charges and proceedings and the range of permissible punishments.” N.C. Gen. Stat. § 15A-1242. Moreover, respondent did not execute a written waiver as required by the IDS Rules. Therefore, the trial court’s finding that respondent was represented by counsel is not supported by any competent evidence, nor is there evidence that respondent or anyone authorized to act on his behalf effectively waived respondent’s right to counsel.

Because the trial court failed to comply with the statutory mandates of N.C. Gen. Stat. § 15A-1242, N.C. Gen. Stat. § 122C-268(d) and IDS Rule 1.6, respondent’s waiver of counsel was ineffective and the resulting commitment order must be vacated.

Although the trial court was not required to follow a specific “checklist” of questions when conducting its inquiry into respon-

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dent's waiver of counsel, we hold that in future cases regarding the waiver of counsel in involuntary commitment proceedings, trial courts should note the language of our Supreme Court in *Moore*:

Although not determinative in our decision, we take this opportunity to provide additional guidance to the trial courts of this State in their efforts to comply with the "thorough inquiry" mandated by N.C.G.S. § 15A-1242. The University of North Carolina at Chapel Hill School of Government has published a fourteen-question checklist "designed to satisfy requirements of" N.C.G.S. § 15A-1242:

1. Are you able to hear and understand me?
2. Are you now under the influence of any alcoholic beverages, drugs, narcotics, or other pills?
3. How old are you?
4. Have you completed high school? college? If not, what is the last grade you completed?
5. Do you know how to read? write?
6. Do you suffer from any mental handicap? physical handicap?
7. Do you understand that you have the right to be represented by a lawyer?
8. Do you understand that you may request that a lawyer be appointed for you if you are unable to hire a lawyer; and one will be appointed if you cannot afford to pay for one?
9. Do you understand that, if you decide to represent yourself, you must follow the same rules of evidence and procedure that a lawyer appearing in this court must follow?
10. Do you understand that, if you decide to represent yourself, the court will not give you legal advice concerning defenses, jury instructions or other legal issues that may be raised in the trial?
11. Do you understand that I must act as an impartial judge in this case, that I will not be able to offer you legal advice, and that I must treat you just as I would treat a lawyer?
12. Do you understand that you are charged with , and that if you are convicted of this (these) charge(s), you could be imprisoned for a maximum of and that the minimum sentence is ? (Add fine or restitution if necessary.)

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13. With all these things in mind, do you now wish to ask me any questions about what I have just said to you?

14. Do you now waive your right to assistance of a lawyer, and voluntarily and intelligently decide to represent yourself in this case?

*See* 1 Super. Court Subcomm., Bench Book Comm. & N.C. Conf. of Super. Court Judges, *North Carolina Trial Judge's Bench Book* § II, ch. 6, at 12-13 (Inst. of Gov't, Chapel Hill, N.C., 3d ed. 1999) (italics omitted). While these specific questions are in no way required to satisfy the statute, they do illustrate the sort of "thorough inquiry" envisioned by the General Assembly when this statute was enacted and could provide useful guidance for trial courts when discharging their responsibilities under N.C.G.S. § 15A-1242.

*Moore*, 362 N.C. at 327-28, 661 S.E.2d at 727. This Court also notes with approval the language in *Jesse M.*:

[W]hen the [trial] court is faced with a patient who wants to waive his right to counsel at an involuntary commitment hearing, the court should: (a) advise the patient of his right to counsel; (b) advise the patient of the consequences of waiving counsel, namely, that the patient and not the lawyer will be responsible for presenting his case, cross-examining the petitioner's witnesses, calling witnesses, and presenting evidence as well as closing argument; (c) seek to discover why the patient wants to represent himself, which may involve a dialogue with counsel or others; (d) learn whether the patient has any education, skill or training that may be important to deciding whether he has the competence to make the decision; (e) determine whether the patient has some rudimentary understanding of the proceedings and procedures to show he understands the right he is waiving; and (f) consider whether there are any other facts relevant to resolving the issue. Once that on-the-record discussion has been completed, the trial court should make specific factual findings supporting the grant or denial of the waiver.

217 Ariz. at 80, 170 P.3d at 689.

**V. CONCLUSION**

"Because we dispose of this case on one assignment of error and because the other assigned errors may not arise at retrial, we need

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not address them." *Pruitt*, 322 N.C. at 601, 369 S.E.2d at 591. The involuntary commitment order is vacated and this matter is remanded for a new hearing.

Vacated and remanded for new hearing.

Judges HUNTER, Robert C., and GEER concur.

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STATE OF NORTH CAROLINA v. BEVERLY YENETTE WHITTED

No. COA10-739

(Filed 15 February 2011)

**1. Constitutional Law— competency to stand trial—failure to inquire *sua sponte***

The trial court erred in a case involving multiple charges by failing to inquire *sua sponte* into defendant's competency. There was substantial evidence indicating that defendant was possibly mentally incompetent during her trial. The case was remanded to the trial court for a determination of whether it could conduct a meaningful retrospective hearing on the issue of defendant's competency at the time of her trial.

**2. Identification of Defendants— surveillance video—no plain error**

The trial court did not commit plain error in a case involving multiple charges by permitting a detective to identify defendant as the person depicted in surveillance videos. Even if the admission of the testimony was error, it was not an exceptional, fundamental error which resulted in a miscarriage of justice or altered the jury's verdict.

**3. Appeal and Error— preservation of issues—failure to object—plain error not argued**

The Court of Appeals dismissed defendant's assertion that the trial court committed plain error in a case involving multiple charges by admitting out-of-court statements by her niece as substantive evidence. Defendant did not object to this evidence at trial and failed to argue plain error in her brief to the Court.

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**4. Sentencing— habitual felon—jury instructions—defendant’s absence—instruction not warranted**

The trial court did not err in a case involving multiple charges by failing to instruct the jury about defendant’s absence from the habitual felon phase of the trial. The trial court did not order defendant removed from the courtroom for being disruptive, but rather defendant asked that she be removed.

**5. Constitutional Law— right to be present at trial—oral waiver—no error**

The trial court did not err in a case involving multiple charges by accepting to be present at certain points during her trial because defendant voluntarily excused herself during certain portions of her trial.

**6. Sentencing— aggravating and mitigating factors—presumptive range—no misapprehension of law**

The trial court did not err in a case involving multiple charges by failing to recognize its ability to impose presumptive range sentences where the aggravating and mitigating factors were in equipoise. The trial court’s comments about deficiencies in the judgment and conviction form did not reflect any misapprehension of the relevant sentencing law.

**7. Appeal and Error— preservation of issues—constitutional errors—not raised at trial**

Defendant’s argument that she was denied substantive due process by the use of a taser, shackles, handcuffs and subterfuge to compel her presence in court was not properly before the Court of Appeals and was dismissed. Because defendant did not raise these constitutional issues at trial, she failed to preserve them for appellate review.

**8. Constitutional Law— effective assistance of counsel—no different result**

Defendant was not denied effective assistance of counsel in a case involving multiple charges where her trial attorney failed to make various objections or motions in five instances. The alleged errors did not alter the outcome of the trial.

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Appeal by Defendant from judgments entered 14 January 2010 by Judge James F. Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 13 January 2011.

*Attorney General Roy Cooper, by Assistant Attorney General Harriet F. Worley, for the State.*

*Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for Defendant.*

STEPHENS, Judge.

On 5 and 26 January, 12 October, and 16 November 2009, the grand jury of Cumberland County returned indictments charging Defendant Beverly Yenette Whitted with felony breaking and entering of a motor vehicle, misdemeanor larceny, two counts of financial transaction card theft, two counts of financial transaction card fraud, common law robbery, obtaining property by false pretenses, larceny from the person, two counts of forgery of instrument, two counts of uttering forged instruments, conspiracy to commit larceny, and having attained the status of habitual felon. Following a trial at the 11 January 2010 criminal session of the superior court, a jury found Defendant guilty of all charges and also found that the felony breaking and entering of a motor vehicle and common law robbery offenses were aggravated due to the advanced age of two of the victims.

Defendant was determined to have a prior record level of IV. The trial court consolidated the felony breaking and entering of a motor vehicle, misdemeanor larceny, financial transaction card theft and financial transaction card fraud offenses into a single judgment and imposed an aggravated range term of 133 to 169 months in prison. The trial court consolidated the common law robbery and obtaining property by false pretenses charges and imposed an additional aggravated range sentence of 133 to 169 months in prison. Finally, the trial court consolidated the remaining offenses into a single judgment and imposed a presumptive range term of 132 to 168 months in prison, all sentences to be served consecutively. For the following reasons, we remand to the trial court for further proceedings.

The charges arise from a series of encounters between Defendant and her niece, Carlita Malloy, and three victims at grocery and discount stores in Fayetteville during July and August 2008. On 17 July 2008, 87-year-old Martha Sutton was grocery shopping in Fayetteville when she was approached by Defendant who struck up a conversation with

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her about potato salad. Later, as Ms. Sutton drove home, she noticed a car following her too closely. When Ms. Sutton arrived at her home, the car pulled into her driveway behind her, and the driver, Defendant, got out and claimed that she had bumped Ms. Sutton's car. The passenger, another woman, remained in the car. Ms. Sutton got out of her own car, leaving the door open and her purse on the seat, and examined Ms. Sutton's bumper, but saw no fresh damage. As Ms. Sutton and Defendant examined the bumper, Defendant's accomplice, her niece, took Ms. Sutton's purse from her car. When Ms. Sutton said she was going to ask her son to come outside and look at the bumper, Defendant drove away quickly. Ms. Sutton did not realize her purse was missing until after Defendant's departure. Several of the credit cards from Ms. Sutton's purse were used to make unauthorized charges in excess of \$300 at a number of local businesses.

On 28 July 2008, 84-year-old William Hancock was shopping at the same grocery store when he noticed Defendant and another woman hovering around him. As he drove home, Mr. Hancock felt the car behind him bump his vehicle, and as he pulled into his driveway, the car pulled in behind him. Defendant got out of the car, while another woman remained in the vehicle. Defendant told Mr. Hancock she had bumped into his car and asked to see his driver's license. When Mr. Hancock pulled out his billfold, Defendant grabbed it. In the ensuing struggle, Mr. Hancock grabbed part of Defendant's cell phone. He also was able to get part of Defendant's license plate number as she drove away. More than \$170 worth of unauthorized charges were later made on Mr. Hancock's credit card at a local Wal-Mart.

On 6 August 2008, 57-year-old Shelva Womack was shopping at a Wal-Mart in Fayetteville when Defendant struck up a conversation with her. As they talked, Defendant's accomplice, another woman, took Ms. Womack's purse from her shopping cart, although Ms. Womack did not realize what had happened until after the two women had walked away. Ms. Womack testified that two checks from her purse were written without her authorization for a total of more than \$200 and that her credit cards were used without authorization to make more than \$400 worth of charges. At trial, Ms. Womack narrated a store surveillance video of the incident. In addition, Nonde Gordon, a clerk at a local grocery store, identified Defendant as the person shown on surveillance video using Ms. Womack's stolen checks.

Detective Jessica Navarro, then of the Fayetteville Police Department, testified that, after speaking to Mr. Hancock, she viewed

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surveillance videos from the grocery store where Mr. Hancock encountered Defendant and the Wal-Mart where Mr. Hancock's stolen credit card was used. Det. Navarro saw Defendant interacting with Mr. Hancock at the grocery store and then buying over \$170 worth of merchandise at Wal-Mart using the stolen credit card. Det. Navarro also spoke to Ms. Sutton and watched surveillance video of her interaction with Defendant at the grocery store. These videos were shown to the jury. Det. Navarro testified that she had watched the Wal-Mart surveillance video of Defendant talking to Ms. Womack while Malloy stole her purse.

Det. Navarro then created a Crime Stoppers advertisement using a video still, which led to a tip regarding Defendant. When Det. Navarro arrived at Defendant's home to interview her, she noticed that Defendant was wearing a distinctive white shirt with three Xs across the front, apparently the same shirt she was seen wearing in several of the surveillance videos. Defendant admitted using the stolen credit card at Wal-Mart, but claimed she had found it in a Burger King bathroom. Det. Navarro later executed a search warrant for Defendant's home and found a number of items which had been purchased at Wal-Mart using Mr. Hancock's stolen credit card.

Malloy, who had earlier pled guilty to the same offenses with which Defendant was charged, was called to testify, but stated that she could not remember or confirm her statements to police about the incidents. Defendant did not offer any evidence.

On appeal, Defendant makes eight arguments: that the trial court committed plain error in (I) permitting a witness to identify her as the person depicted in surveillance videos, and (II) admitting out-of-court statements as substantive evidence; erred in (III) failing to instruct the jury about her absence from the habitual felon phase of the trial, (IV) accepting her trial counsel's oral waiver of her right to be present, and (V) failing to recognize its ability to impose presumptive range sentences where the aggravating and mitigating factors were in equipoise; and that she was denied (VI) a fair trial by the trial court's failure to inquire *sua sponte* into her competency, (VII) substantive due process by the use of a taser, shackles, handcuffs, and subterfuge to compel her presence in court, and (VIII) effective assistance of counsel. For the reasons discussed below, we remand to the trial court for further proceedings to address issue VI. We dismiss Defendant's arguments on issues II and VII. We find no error or no prejudicial error as to Defendant's remaining issues.

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*Lack of Competency Hearing*

[1] Defendant argues she was denied a fair trial by the trial court's failure to inquire *sua sponte* into her competency. We agree.

Section 15A-1001(a) of our General Statutes states:

No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

N.C. Gen. Stat. § 15A-1001(a) (2009). Further,

under the Due Process Clause of the United States Constitution, [a] criminal defendant may not be tried unless he is competent. As a result, [a] trial court has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent. In enforcing this constitutional right, the standard for competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him.

*State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (internal quotation marks and citations omitted). In addition, "a trial judge is required to hold a competency hearing when there is a bona fide doubt as to the defendant's competency even absent a request." *State v. Staten*, 172 N.C. App. 673, 678, 616 S.E.2d 650, 654-55 (2005). "'Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant' to a bona fide doubt inquiry." *State v. McRae*, 139 N.C. App. 387, 390, 533 S.E.2d 557, 559 (2000) (quoting *Drope v. Missouri*, 420 U.S. 162, 180, 43 L. Ed. 2d 103, 118 (1975)).

On appeal, Defendant offers the following as substantial evidence indicating that she was possibly mentally incompetent during her trial:

- At her first court hearing, the magistrate noted her past history of mental illness, specifically paranoid schizophrenia. Defendant rejected a favorable pretrial plea offer, remarking that her appointed counsel worked for the State.

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- After opening statements, the trial court set a \$75,000 cash bond. Defendant responded with an emotional outburst, telling the trial court she did not care whether she got life in prison. She also told the trial court she was guilty, stating, “That’s what you want.”
- On the third day of her trial, Defendant refused to return to the courtroom because she felt her rights were being violated, and stated she felt she could rely on her faith. When Defendant was brought forcibly into court, handcuffed to a rolling chair after having been tasered, she chanted loudly and sang prayers and religious imprecations, refusing to be silent or cooperate with trial proceedings.
- Later, for sentencing, Defendant was brought back to the courtroom strapped to a gurney, again singing, crying, screaming and mumbling as the trial court pronounced sentence.

In light of her history of mental illness, including paranoid schizophrenia and bipolar disorder, we conclude that Defendant’s remarks that her appointed counsel was working for the State and that the trial court wanted her to plead guilty, coupled with her irrational behavior in the courtroom, constituted substantial evidence and created a *bona fide* doubt as to her competency. Thus, the trial court erred in failing to institute, *sua sponte*, a competency hearing for Defendant.

The State asserts that the trial court *did* make such an inquiry into Defendant’s competency. On 11 January 2010, at the start of trial, defense counsel mentioned that Defendant had recently undergone shoulder surgery and was taking pain medication. The trial court then asked Defendant and her trial counsel whether the medication was impairing her ability to understand the proceedings or her decision to reject the plea bargain being offered by the State. Both replied that it was not. The trial court also asked Defendant about her ability to read and write, and whether she understood the charges against her. However, as the State acknowledges, the trial court’s inquiry was only into the effects of the pain medication Defendant was taking.

More importantly, the trial court’s limited inquiry was not timely. The trial court questioned Defendant about the effects of her medication on 11 January 2010, but her refusal to return to the courtroom and resulting outbursts occurred two days later on 13 January 2010. As this Court as previously noted in *McRae*, a defendant’s

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competency to stand trial is not necessarily static, but can change over even brief periods of time.

In *McRae*, the defendant, who suffered from schizophrenia, underwent at least six psychiatric evaluations over a seventeen-month period prior to his first trial; at some points the defendant was found competent to stand trial and at others he was not. 139 N.C. App. at 390-91, 533 S.E.2d at 559-60. Immediately after a hearing finding him competent, the defendant went to trial. *Id.* at 391, 533 S.E.2d at 560. Following a mistrial, the defendant was again evaluated and found competent, but five days elapsed between the date of the hearing and the start of the defendant's second trial, "and the trial court did not conduct a post-evaluation competency hearing before [the] second trial." *Id.* On appeal, we held that the trial court erred in not conducting a competency hearing before the second trial, noting "concern about the temporal nature of [the] defendant's competency." *Id.*

By statute, "[w]hen the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed." N.C. Gen. Stat. § 15A-1002(b) (2009) (emphasis added). As recognized by *McRae*, defendants can be competent at one point in time and not competent at another. Thus, assuming *arguendo* that the trial court's limited 11 January 2010 questioning of Defendant constituted a competency hearing, it could not have addressed the *bona fide* doubt about Defendant's competency which arose on 13 January 2010.

Following the procedure employed in *McRae*, we remand to the trial court for a determination of whether it can conduct a meaningful retrospective hearing on the issue of Defendant's competency at the time of her trial. 139 N.C. App. at 392, 533 S.E.2d at 560-61 ("The trial court is in the best position to determine whether it can make such a retrospective determination of [a] defendant's competency."). On remand,

if the trial court concludes that a retrospective determination is still possible, a competency hearing will be held, and if the conclusion is that the defendant was competent, no new trial will be required. If the trial court determines that a meaningful hearing is no longer possible, defendant's conviction must be reversed and a new trial may be granted when [she] is competent to stand trial.

*McRae*, 139 N.C. App. at 392, 533 S.E.2d at 561. Because it is possible that, on remand, the trial court will conclude that a retrospective

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competency determination is still possible, and, following the resulting hearing, that Defendant was competent and no new trial is required, we now address Defendant's remaining issues on appeal.

*Admission of Identification Evidence*

[2] Defendant argues that the trial court committed plain error in permitting Det. Navarro to identify her as the person depicted in surveillance videos. We disagree.

Because Defendant did not object to the admission of this evidence at trial, we review only for plain error. *State v. Locklear*, 363 N.C. 438, 449, 681 S.E.2d 293, 303 (2009). "We reverse for plain error only in the most exceptional cases, . . . and only when we are convinced that the error was either a fundamental one resulting in a miscarriage of justice or one that would have altered the jury's verdict." *Id.* (citations omitted).

Here, Det. Navarro testified that Defendant was the person depicted using a stolen credit card in two surveillance videos from a Wal-Mart and using stolen checks in surveillance videos from a grocery store. Defendant contends that this lay opinion testimony constitutes plain error in that it likely "tilted the scales" and resulted in her conviction. We are not persuaded. Assuming without deciding that the admission of Det. Navarro's testimony was error, we do not believe it was an exceptional, fundamental error which resulted in a miscarriage of justice or altered the jury's verdict. The evidence of Defendant's guilt was overwhelming and included identification of Defendant by each of the three victims, the head security manager of the Wal-Mart where items were purchased using a stolen credit card, and the cashier of the grocery store where stolen checks were used. In addition, items purchased using Mr. Hancock's stolen credit card were found in Defendant's home and Defendant admitted to Det. Navarro that she had used a stolen credit card at Wal-Mart. Finally, the State introduced various surveillance videos which showed Defendant encountering Ms. Sutton and Mr. Hancock in the grocery store, and cashing stolen checks. We do not believe that, absent Det. Navarro's lay opinion testimony that Defendant was the person depicted in the surveillance videos, the jury would have returned verdicts of not guilty. Thus, Defendant cannot meet her burden to show plain error, and we overrule this argument.

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*Admission of Out-of-court Statements*

**[3]** Defendant next asserts that the trial court committed plain error by admitting out-of-court statements by her niece, Carlita Malloy, as substantive evidence. Because Defendant did not object to this evidence at trial and also fails to argue plain error in her brief to this Court, we dismiss.

As noted above, to prevail on a claim of plain error, a defendant must show that an error “was either a fundamental one resulting in a miscarriage of justice or one that would have altered the jury’s verdict.” *Locklear*, 363 N.C. at 449, 681 S.E.2d at 303. Defendant concedes that she did not object at trial to the admission of pre-arrest and post-arrest statements by Malloy, but now asserts that their admission constituted plain error. However, Defendant fails to explain the contents of Malloy’s statements or how their admission resulted in a miscarriage of justice or altered the jury’s verdict. Such a bare “assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule.” *State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000). Because Defendant fails to make the requisite arguments and analysis in her brief, she fails to argue plain error. Accordingly, we dismiss her contentions on this issue.

*Instruction Regarding Defendant’s Absence from Courtroom*

**[4]** Defendant also argues that the trial court erred in failing to instruct the jury about her absence from the habitual felon phase of the trial. We disagree.<sup>1</sup>

Defendant contends that the trial court violated the mandate of N.C. Gen. Stat. § 15A-1032 which provides, in pertinent part:

- (a) A trial judge, after warning a defendant whose conduct is disrupting his trial, may order the defendant removed from the trial if he continues conduct which is so disruptive that the trial cannot proceed in an orderly manner. When practicable, the judge’s warning and order for removal must be issued out of the presence of the jury.

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1. Our discussion on this and the following issue presumes that, on remand to the trial court, Defendant will be found to have been competent throughout her trial. In the event that either Defendant is found to have been incompetent or that the trial cannot conduct a retroactive competency hearing, Defendant will receive a new trial and these issues will be moot.

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(b) If the judge orders a defendant removed from the courtroom, he must:

...

(2) Instruct the jurors that the removal is not to be considered in weighing evidence or determining the issue of guilt.

N.C. Gen. Stat. § 15A-1032 (2009). However, our review of the record reveals that the trial court did not order Defendant removed from the courtroom for being disruptive, but rather that she asked to be removed. Defendant refused to return to the courtroom for the habitual felon phase of her trial. The trial court had Defendant brought into the courtroom handcuffed to a rolling chair, at which point she began to sing and chant and behave in a generally disruptive manner. The trial court then asked counsel for Defendant and the State if they wished to have Defendant removed, and all agreed this would be best. However, the trial court then addressed Defendant directly and asked her whether she wished to return to the holding cell. Defendant ignored the trial court's questions twice, but after he asked a third time, she stopped chanting and replied, "Put me back where I was." The trial court inquired several more times to be sure that Defendant understood his question and to clarify that she wanted to return to the holding cell and give up her right to be present during her trial. Defendant responded that she did. The trial court then made a finding that Defendant had voluntarily waived her right to be present at the habitual felon phase of her trial. Because the trial court did not order Defendant removed from the courtroom, the requirements of N.C. Gen. Stat. § 15A-1032(b) were not triggered. Defendant's argument on this issue is overruled.

*Oral Waiver of Right to be Present*

[5] Defendant next argues that the trial court erred in accepting her trial counsel's oral waiver of her right to be present. We disagree.

Specifically, Defendant contends that the trial court violated the requirements of N.C. Gen. Stat. § 15A-1011 in accepting her trial counsel's oral waiver of her right to be present at certain points during her trial. Section 15A-1011 is entitled "Pleas in district and superior courts; waiver of appearance" and specifies that

(d) A defendant may execute a written waiver of appearance and plead not guilty and designate legal counsel to appear in his behalf in the following circumstances:

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(1) The defendant agrees in writing to waive the right to testify in person and waives the right to face his accusers in person and agrees to be bound by the decision of the court as in any other case of adjudication of guilty and entry of judgment, subject to the right of appeal as in any other case; and

(2) The defendant submits in writing circumstances to justify the request and submits in writing a request to proceed under this section; and

(3) The judge allows the absence of the defendant because of distance, infirmity or other good cause.

N.C. Gen. Stat. § 15A-1011(2009). This statute applies to a defendant's waiver of her right to be present for entry of pleas. Beyond the statute's title and plain language, we also note that section 15A-1011 is part of Chapter 15A, Article 57 entitled "Pleas." This statute is not applicable where a defendant waives her right to be present at other times during her trial.

"It is well established that both the United States and North Carolina Constitutions provide criminal defendants the right to confront their accusers at trial." *State v. Richardson*, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991). However,

[i]n noncapital felony trials, this right to confrontation is purely personal in nature and may be waived by a defendant. *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985); *State v. Hayes*, 291 N.C. 293, 296-97, 230 S.E.2d 146, 148 (1976); *State v. Moore*, 275 N.C. 198, 208, 166 S.E.2d 652, 659 (1969). A defendant's voluntary and unexplained absence from court subsequent to the commencement of trial constitutes such a waiver. *State v. Wilson*, 31 N.C. App. 323, 229 S.E.2d 314 (1976); *State v. Mulwee*, 27 N.C. App. 366, 219 S.E.2d 304 (1975). Once trial has commenced, the burden is on the defendant to explain his or her absence; if this burden is not met, waiver is to be inferred. *State v. Austin*, 75 N.C. App. 338, 330 S.E.2d 661 (1985); *State v. Stockton*, 13 N.C. App. 287, 185 S.E.2d 459 (1971).

*Id.* In *Richardson*, the Supreme Court went on to discuss examples of waiver of the right to confront:

Whether such a burden has been satisfied has been the subject of numerous appellate decisions. In *State v. Stockton*, 13 N.C. App. 287, 185 S.E.2d 459, for instance, defendant was present during

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the first day of his trial but failed to appear when the trial recommenced on the second day. Upon inquiry by the trial judge, defense counsel related that he had neither seen nor heard from defendant. Thereafter, the court concluded that defendant Stockton had due notice of the time that his trial was to commence and that his absence amounted to a waiver. On appeal, the Court of Appeals agreed, concluding that the defendant voluntarily absented himself after his first day of trial and therefore waived his right to be present during the trial and rendering of the verdict. *Id.* at 292, 185 S.E.2d at 463. Findings of no error under similar circumstances have repeatedly been reached by this Court, as well as the Court of Appeals. *State v. Kelly*, 97 N.C. 404, 2 S.E. 185 (1887); *State v. Austin*, 75 N.C. App. 338, 330 S.E.2d 661 (1985); *State v. Potts*, 42 N.C. App. 357, 256 S.E.2d 497 (1979); *State v. Montgomery*, 33 N.C. App. 693, 236 S.E.2d 390, *disc. rev. denied and appeal dismissed*, 293 N.C. 256, 237 S.E.2d 258 (1977); *State v. Wilson*, 31 N.C. App. 323, 229 S.E.2d 314 (1976).

*Id.* at 178-79, 410 S.E.2d at 63.

Here, defendant was present at entry of her plea of not guilty to all charges on 5 June 2009, and, thus, N.C. Gen. Stat. § 15A-1011 is inapplicable. However, as discussed above, defendant asked to be returned to the holding cell during the habitual felon phase of her trial. Defendant also refused to return to the courtroom for guilt-phase closing arguments and for the aggravating factor phase of her trial. Because Defendant voluntarily absented herself during certain portions of her trial, she waived her right to be present at those points. This argument is overruled.

*Sentencing*

[6] Defendant also argues that the trial court erred in failing to recognize its ability to impose presumptive range sentences where the aggravating and mitigating factors were in equipoise. We disagree.

Defendant contends that the trial court was under a misapprehension of law when it imposed aggravated sentences for felony breaking and entering of a motor vehicle and common law robbery. Specifically, Defendant asserts that the trial court was under the mistaken impression that it could not impose a presumptive range sentence where the jury found a single aggravating factor and where the trial court itself found a single mitigating factor. We review *de novo*

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allegations that a trial court has failed to recognize its discretion to act. *State v. McAvoy*, 331 N.C. 583, 591, 417 S.E.2d 489, 495 (1992).

Under the Structured Sentencing Act, the trial court “shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court.” N.C. Gen. Stat. § 15A-1340.16(a) (2009). “Even assuming evidence of aggravating or mitigating factors exists, the Act leaves the decision to depart from the presumptive range ‘in the discretion of the trial court.’” *State v. Norris*, 360 N.C. 507, 512, 630 S.E.2d 915, 918 (2006) (quoting N.C. Gen. Stat. § 15A-1340.16(a)).

During sentencing, the trial court remarked that the judgment and conviction form allowed it to check only two alternatives when weighing the aggravating and mitigating factors: that the aggravating factors outweighed the mitigating factors, or vice versa. The trial court then stated that the form does not allow for a trial court to indicate that the aggravating and mitigating factors are in equipoise. Defendant contends that these remarks indicate that the trial court did not realize it had the discretion to impose a sentence in the presumptive range despite the aggravating and mitigating factors being in equipoise. However, we do not believe these comments about deficiencies in the form reflect any misapprehension of the relevant sentencing law. Indeed, our review of the transcript reveals a comment by the trial court that “one aggravator can outweigh 15 or 20 mitigators.” This remark clearly indicates the trial court’s awareness of its discretion in weighing the aggravating and mitigating factors. This argument is overruled.

*Denial of Substantive Due Process*

[7] Defendant next argues that she was denied substantive due process by the use of a taser, shackles, handcuffs and subterfuge to compel her presence in court. We conclude that this issue is not properly before us and dismiss this argument.

In making this argument, Defendant relies on the protections of due process in the United States and North Carolina Constitutions. However, we note that Defendant did not object on these grounds or raise these arguments in the trial court. Assertions of constitutional error “will not be considered for the first time on appeal.” *State v. Chapman*, 359 N.C. 328, 360, 611 S.E.2d 794, 822 (2005) (citations omitted). Because Defendant did not raise these constitutional issues

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at trial, she has failed to preserve them for our review and they are waived. Accordingly, Defendant's arguments on this issue are dismissed.

*Ineffective Assistance of Counsel*

**[8]** Lastly, Defendant argues that she was denied effective assistance of counsel in that her trial attorney failed to make various objections or motions in five instances. We disagree.

In order

[t]o successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. First, [she] must show that counsel's performance fell below an objective standard of reasonableness. Second, once defendant satisfies the first prong, [she] must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error.

*State v. Blakeney*, 352 N.C. 287, 307-08, 531 S.E.2d 799, 814-15 (2000) (citations omitted), cert. denied, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). Further, “if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel’s alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel’s performance was actually deficient.” *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

Specifically, Defendant argues that her trial counsel’s performance fell below an objective standard of reasonableness in that he failed to: request a competency hearing; ensure the trial court was familiar with her history of mental illness; properly preserve for appeal the denial of her motion to require the State to conduct a photo lineup identification; move for dismissal, mistrial or a continuance when Defendant had to be brought into the courtroom handcuffed to a rolling chair; seek a jury instruction on her absence from the courtroom during various portions of the trial; and object to the admission of Malloy’s statements, and Det. Navarro’s identification of Defendant in surveillance videos and her comment that she had compared the surveillance video images to a police mug shot of Defendant.

Given the overwhelming evidence against Defendant, we do not believe that her trial counsel’s failure to preserve for appeal the trial court’s denial of her motion to require the State to conduct a photo lineup identification altered the outcome of the trial. Likewise, we do

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not believe that trial counsel's failure to move for dismissal, mistrial or a continuance when Defendant had to be brought into the courtroom handcuffed to a rolling chair altered the outcome of her trial since this event took place outside the presence of the jury. We also conclude that, even had trial counsel sought a jury instruction on Defendant's absence and objected to the admission of Malloy's statements or Det. Navarro's testimony, the overwhelming evidence against Defendant would likely have led to the same jury verdicts of guilty on all charges. Accordingly, these arguments are overruled.

Our remand for a retroactive competency hearing, or in the event the trial court concludes that it cannot conduct such a hearing, our reversal of the judgments against her and order of a new trial, provides Defendant with the relief to which she would be entitled if we held that she had received ineffective assistance of counsel on these issues.

Dismissed in part; no error in part; no prejudicial error in part; and remanded for further proceedings not inconsistent with this opinion.

Judges GEER and STROUD concur.

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STATE OF NORTH CAROLINA v. DENNIS TYRONE GARNETT, SR.

No. COA10-111

(Filed 15 February 2011)

**1. Constitutional Law— right to confrontation—expert testimony—analysis performed by non-testifying analyst—erroneous—no prejudicial error**

The trial court erred in a drugs case by permitting the State's expert witness to testify to the identity and weight of the substance seized during a search of defendant's apartment and vehicle where the expert's testimony was based upon an analysis performed by a non-testifying forensic analyst. However, in light of the additional evidence presented at trial and the Court's plain error review, the erroneously admitted testimony did not prejudice defendant such that the jury would have reached a different conclusion had the testimony not been admitted.

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**2. Drugs— jury instructions—controlled substances—variance between indictment and instruction—no prejudicial error**

The trial court did not commit reversible error in a drugs case where the pertinent indictment charged defendant with maintaining a dwelling house “for keeping and selling a controlled substance” but the court instructed the jury that to find defendant guilty of the charge, the State must prove that Defendant “maintained a dwelling house used for the purpose of unlawfully keeping or selling marijuana.” *State v. Lancaster*, 137 N.C. App. 37, was controlling.

**3. Sentencing— mitigating factors—presumptive range—no abuse of discretion**

The trial court did not abuse its discretion in refusing defendant’s request for a mitigated sentence. Despite uncontested evidence of mitigating circumstances, it was within the trial court’s discretion not to find any mitigating factors and to sentence defendant in the presumptive range.

Appeal by Defendant from judgment entered 16 October 2008 by Judge Zoro J. Guice, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 31 August 2010.

*Attorney General, Roy Cooper, by Kimberly W. Duffley,  
Assistant Attorney General, for the State.*

*Paul M. Green for Defendant-appellant.*

HUNTER, JR., Robert N., Judge.

By writ of certiorari, Dennis Tyrone Garnett, Sr., (“Defendant”) appeals from an order imposing 168 to 211 months’ imprisonment entered pursuant to his jury conviction for multiple drug related charges and his subsequent guilty plea for additional drug related and habitual felon charges. Defendant contends the trial court: committed plain error by permitting the State’s forensic chemist to testify as to the identity and weight of the marijuana analyzed by a non-testifying chemist in violation of Defendant’s constitutional rights to confront the witnesses testifying against him; erred by charging the jury with an instruction that varied from the language of the indictment; and abused its discretion by declining to find mitigating factors despite

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uncontested evidence of such factors. After a careful review of the record, we find no prejudicial error.

**I. Factual and Procedural Background**

On 19 June 2008, officers of the Asheville Police Department obtained and executed a warrant to search Defendant, the residence he shared with his girlfriend, and a vehicle that Defendant had been observed driving. The police obtained the search warrant as a result of their investigation of Defendant's suspected drug related activities. At trial the State's evidence tended to establish the following facts.

When officers arrived outside of Defendant's residence they found Defendant and several other individuals standing around the vehicle that was to be searched. The police observed Defendant walking toward the rear tire of the car then back away from the tire as the officers exited their patrol car. The officers immediately handcuffed and searched Defendant and read to Defendant his *Miranda* rights; Defendant acknowledged that he understood these rights. On Defendant's person, the police found approximately four thousand dollars (\$4,000.00) in cash and two cell phones.

The police officers executed a search of the vehicle's exterior with a drug-sniffing K-9 during which the K-9 alerted to the right rear tire well. There, the officers found a black bag containing several smaller bags of what appeared to be marijuana and cash. Upon searching the interior of the vehicle, the officers found a purse containing a .22 caliber pistol and bullets located in the compartment for the carjack. In the compartment between the front seats, the police found two additional bags, each containing hundreds of smaller, empty, black bags similar to the bags found in the rear tire well.

Upon searching Defendant's residence, the officers found: nine "dime bags" of what appeared to be marijuana in a bowl on top of the television in the living room; a Nike bag in the master bedroom closet, to which the K-9 had alerted, that contained two gallon-sized bags containing what appeared to be marijuana; letters addressed to Defendant with the address of the residence being searched; a police scanner; and a make-up case also containing a small amount of what appeared to be marijuana. The officers estimated the total weight of the alleged marijuana seized to be approximately one hundred and fifty-one (151) grams.

Two police officers testified that during the search of the vehicle and Defendant's apartment, after Defendant was read his *Miranda*

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rights, Defendant made several incriminating statements. Officer Tammy Bryson testified that when Defendant was asked about the alleged drugs found in the car Defendant stated he smoked the marijuana, but did not sell it. Later, when escorted inside his residence and in the presence of his girlfriend, Defendant told the police that all of the alleged marijuana found was his and he was selling it; that his girlfriend did not sell it, she only smoked the marijuana. Additionally, two officers testified that Defendant told them he could provide the names of people from whom he received his supply of marijuana if his cooperation would mitigate the charges against him.

Defendant was indicted by a Buncombe County Grand Jury on 7 July 2008 for possession with intent to sell or deliver a Schedule VI controlled substance, marijuana, pursuant to N.C. Gen. Stat. § 90-95(A)(1); knowingly and intentionally keeping and maintaining a dwelling house for keeping and selling a Schedule VI controlled substance, marijuana, pursuant to N.C. Gen. Stat. § 90-108(A)(7); possession of a firearm by a felon, pursuant to N.C. Gen. Stat. § 14-415.1; and possession of drug paraphernalia, pursuant to N.C. Gen. Stat. § 90-113.22. The date of these offenses was 19 June 2008. Additionally, Defendant was indicted for being a habitual felon based on three prior felony convictions, pursuant to N.C. Gen. Stat. § 14-7.1. The trial court decided, however, to hold the habitual felon charge for consideration until after the jury returned verdicts on the other four charges.

Defendant was tried before Judge Zoro J. Guice, Jr. during the 13 October 2008 Session of the Buncombe County Criminal Superior Court. Before the jury was empaneled, Defendant made a Motion to Suppress seeking to exclude from evidence the statements he made to police on the day of the search; Defendant alleged that he was not properly advised of his *Miranda* rights at the time he made the statements. After a hearing on the motion, the trial court found Defendant had been properly advised of his *Miranda* rights, that he acknowledged he understood them, that the statements he made to the police were made voluntarily and, thus, admissible into evidence.

On 16 October 2008, the jury returned guilty verdicts for each of the indictments; the habitual felon indictment was not before the jury. Defendant then pled guilty to additional charges: one charge of possession of drug paraphernalia, pursuant to N.C. Gen. Stat. § 90-113.22; one charge of knowingly and intentionally keeping and maintaining a dwelling house for keeping and selling a Schedule

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VI controlled substance, marijuana, pursuant to N.C. Gen. Stat. § 90-108(A)(7); and one charge of possession with intent to sell or deliver a Schedule VI controlled substance, marijuana, pursuant to N.C. Gen. Stat. § 90-95(A)(1). The date of these offenses was 12 September 2008. Defendant also pled guilty to two charges of being a habitual felon, pursuant to N.C. Gen. Stat. § 14-7.1. In exchange, Defendant's sentences for the charges for which he was found guilty would run concurrently with the sentences for the charges to which he pled guilty. Defendant was sentenced on 16 October 2008 in the presumptive range of authorized sentences to an active term of 168 to 211 months' imprisonment. After pronouncement of his sentence, Defendant informed the court he would not appeal. On 21 April 2009, however, Defendant filed a Petition for Writ of Certiorari, which this Court granted pursuant to section 7A-32 of our General Statutes and Rule 21 of the North Carolina Rules of Appellate Procedure. N.C. Gen. Stat. § 7A-32 (2009); N.C. R. App. P. 21 (2011).

**II. Analysis****A. Admissibility of Expert's Testimony**

[1] On appeal, Defendant first contends that the trial court erred in permitting the State's expert witness to testify as to the identity and weight of the "leafy green plant substance" seized where the expert's testimony was based upon the analysis performed by a non-testifying forensic analyst. Defendant argues this testimony was admitted in violation of his constitutional right to confront the witnesses testifying against him pursuant to the United States Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, — U.S. —, —, 129 S. Ct. 2527, 2532 (2009), and the North Carolina Supreme Court's holding in *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 305 (2009). While this testimony was admitted in violation of Defendant's rights under the Confrontation Clause, we nevertheless conclude this error was not prejudicial in light of the additional evidence of Defendant's guilt.

Defendant concedes that he made no objection at trial to the admission of the State's expert's testimony and that he thereby waived his right to object on appeal under our Rules of Appellate Procedure. N.C. R. App. P. 10(a)(1) (2011). Defendant, however, requests this Court to examine the issue for plain error. N.C. R. App. P. 10(a)(4) (2011). "Plain error" has been defined as including error so grave as to deny a fundamental right of the defendant so that, absent the error, the jury would have reached a different result." *State*

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*v. Jones*, — N.C. App. —, —, — S.E.2d —, —, No. 10-475, slip op. at 3 (Dec. 21, 2010) (citation omitted), *temporary stay allowed*, — N.C. —, — S.E.2d —, 2011 N.C. LEXIS 6 (Jan. 10, 2011).

The Confrontation Clause of the Sixth Amendment prohibits the introduction of testimonial evidence unless the declarant is not available for cross-examination and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2005). While the Supreme Court has not provided a precise definition of testimonial evidence, the Court has established that laboratory reports, or “certificates of analysis,” showing the results of forensic analyses of evidence seized by the police are testimonial in nature and are subject to the Confrontation Clause. *Melendez-Diaz*, — U.S. at —, 129 S. Ct. at 2532 (“The ‘certificates’ are functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’ ”) (internal citation omitted).

In *State v. Locklear*, the North Carolina Supreme Court applied the holding of *Melendez-Diaz* to conclude that the Confrontation Clause prohibits the introduction of the live testimony by an expert witness whose expert opinion is based upon the results of non-testifying analysts. 363 N.C. at 452, 681 S.E.2d at 305; *State v. Galindo*, — N.C. App. —, —, 683 S.E.2d 785, 788 (2009) (holding testimony of crime lab supervisor was inadmissible under the Confrontation Clause as his opinion was based “solely” upon the laboratory report produced by a non-testifying analyst).

Subsequent to *Locklear* and *Galindo*, this Court recognized an exception which would permit the admittance of expert testimony when the expert testified “not just to the results of other experts’ tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts’ tests, and her own expert opinion based on a comparison of the original data.” *State v. Mobley*, — N.C. App. —, —, 684 S.E.2d 508, 511-12 (2009), *disc. review denied*, 363 N.C. 809, 692 S.E.2d 393 (2010); *State v. Hough*, N.C. App. —, —, 690 S.E.2d 285, 291 (2010) (holding no Confrontation Clause violation where testifying expert did not perform any forensic analysis on the evidence, but conducted a “peer review” of the testing analyst’s work sufficient to establish her own expert opinion). Significantly, however, in *Hough* this Court recognized that *not* “every ‘peer review’ will suffice to establish that the testifying expert is testifying to his or her expert opinion.” —

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N.C. App. at —, 690 S.E.2d at 291. This distinction has been applied by this Court in the recent decisions of *State v. Brewington*, — N.C. App. —, 693 S.E.2d 182, *temporary stay allowed*, 364 N.C. 243, 698 S.E.2d 73 (2010), and *State v. Williams*, — N.C. App. —, — S.E.2d —, No. 10-58 (Dec. 7, 2010), *temporary stay allowed*, — N.C. —, — S.E.2d — (Dec. 20, 2010).

In *Williams*, this Court held as inadmissible the testimony of the State's expert witness where the expert witness had conducted a peer review of the testing analyst's examination of the seized evidence. *Williams*, — N.C. App. at —, — S.E.2d at —, slip op. at 9. We concluded the State's expert witness "could not have provided her own admissible analysis of the relevant underlying substance" where she did not conduct any tests on the seized evidence and was not present when the testing analyst performed his analysis. *Id.* The rejection of the peer review testimony in *Williams* was warranted, we noted, in light of the "importance of cross-examination as a tool to expose, among other things, the care (or lack thereof) with which a chemist conducted tests on a substance" which could not be assessed by a mere summary of the underlying analyses provided by the State's expert witness. *Id.*

In the present case, we conclude the testimony by the State's expert witness as to the results of the analysis of the evidence seized from Defendant is indistinguishable from the testimony rejected in *Williams*. At trial the State called Special Agent Jay Pintacuda, a senior forensic chemist for the State Bureau of Investigation ("SBI"), to testify as to the identity and weight of the "leafy green plant substance" that was seized during the search of Defendant's apartment and the vehicle. Pintacuda was certified by the trial court, without objection, as an expert witness in forensic chemistry. It is evident from the record that Pintacuda did not perform the SBI's analysis of the seized evidence. Rather, a testing analyst, Robert Briner, conducted the SBI's forensic analysis and completed a laboratory report averring to the weight and identity of the substance seized from Defendant. When Pintacuda was asked to describe his role with the SBI, he stated:

As a senior forensic chemist my job includes the review of *other work product of other chemists*. I examine *their* notes, lab reports for technical and administrative review and to make sure that the work product, lab reports going out, meet quality control,

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quality assurance guidelines and policies and procedures of the State Bureau of Investigation.

(Emphasis added.) When asked if he had reviewed Briner's report and conclusions regarding the evidence at issue in this case, Pintacuda responded, "I have *documentation* here and I have had occasion to examine it to review the findings and work product and determine if it meets the quality assurance guidelines of the SBI laboratory." (Emphasis added.)

The State then directed Pintacuda's attention to a bag of "plant material" confiscated in Defendant's apartment and asked Pintacuda:

Q: [I]s there anything on 5A [a bag of the seized plant material] to show that *Mr. Briner* examined that item and performed *the analysis that you've reviewed* and that *he came* to some conclusion of what that substance was?

A: Yes.

Q: How do you know that?

A: The writing on the outside surface is the SBI crime laboratory number, the initials, the date and the exhibit number.

....

*Robert Briner had occasion to examine it and identified it as being marijuana, and he recorded the weight in the lab report.*

....

*He identified this plant material as being marijuana . . . . He weighed the material and recorded the weight . . . .*

(Emphasis added.) This colloquy is representative of Pintacuda's testimony in which he consistently refers to the conclusions drawn by the testing analyst not conclusions from his own analysis. We find significant that the State's questioning of their forensic expert revealed mistakes made by the testing analyst during his analysis of the evidence. When the State asked Pintacuda to match the State's exhibits, the seized evidence, to the SBI's results on the laboratory report Pintacuda was unable to do so with certainty due to an apparent mix-up by Briner. The State attempted to explain the confusion and asked of Pintacuda: "So [Briner] got it labeled wrong on his report?"; "So he just mislabeled that?"; "He made a mistake?"; and "... so that would

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be a typographical error—”. Pintacuda acknowledged mistakes were made by the testing analyst and attempted to explain the discrepancies in the lab report as just “a labeling issue,” surmising, “They commingled everything together in similar bags *from what I can gather.*” (Emphasis added.)

As we recognized in *Williams*, we conclude this testimony demonstrates the necessity for cross-examination of the individuals who perform the forensic analysis of such evidence “so that their honesty, competence, and the care *with which they conducted the tests* in question could be exposed to testing in the crucible of cross-examination.” *Williams*, — N.C. App. at —, — S.E.2d at —, slip op. at 6 (quoting *Brewington*, — N.C. App. at —, 693 S.E.2d at 189.) It is apparent from the record that Special Agent Pintacuda’s testimony regarding the SBI’s laboratory report does not qualify as an independent expert opinion as seen in *Mobley* or *Hough*. Rather it was a summary of the report produced by Briner, the non-testifying analyst. As such, and without the State establishing that Briner was unavailable to testify and that Defendant had the opportunity to cross-examine him on a prior occasion, the admission of Special Agent Pintacuda’s testimony regarding the SBI’s laboratory report violated Defendant’s Confrontation Clause rights. *See Locklear*, 363 N.C. at 452, 681 S.E.2d at 305.

We conclude, however, that in light of the additional evidence presented at trial and our plain error review, Pintacuda’s testimony as to the SBI laboratory report did not prejudice Defendant such that the jury would have reached a different conclusion had the testimony not been admitted. *See Jones*, — N.C. App. at —, — S.E.2d at —, slip op. at 3 (citation omitted). “A violation of the defendant’s rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt.” N.C. Gen. Stat. § 15A-1443(b) (2009). The State must prove the trial court’s error was harmless. *Id.* “[T]he presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt.” *State v. Morgan*, 359 N.C. 131, 156, 604 S.E.2d 886, 901 (2004) (citation omitted).

The State introduced overwhelming evidence to support Defendant’s convictions for possession of marijuana with intent to sell or deliver and knowingly and intentionally maintaining a dwelling for keeping or selling marijuana: Defendant’s physical proximity to the car wheel well where police found several bags of cash and what

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appeared to be marijuana, and to which the police K-9 had alerted; hundreds of similar bags located inside the car; observations of Defendant's use of the car and a receipt in Defendant's name for repairs made to the car. Inside Defendant's home the police K-9 altered the officers to a large bag of what appeared to be marijuana in the bedroom closet, "dime bags" and a make-up bag containing a similar substance in other parts of the residence.

Furthermore, Special Agent Pintacuda identified the evidence seized from Defendant as marijuana. We note, this identification was an in-court, visual identification independent from Pintacuda's testimony regarding the SBI's laboratory report. While Pintacuda was tendered as an expert witness in forensic chemistry, this Court has previously held that a police officer experienced in the identification of marijuana may testify to his visual identification of evidence as marijuana:

Admittedly, it would have been better for the State to have introduced admissible evidence of chemical analysis of the substance, especially in light of the fact that testimony indicated the State Bureau of Investigation had conducted such analysis. . . . [T]he absence of such direct evidence does not, as the appellant suggests, prove fatal. Though direct evidence may be entitled to much greater weight with the jury, the absence of such evidence does not render the opinion testimony insufficient to show the substance was marijuana.

*State v. Fletcher*, 92 N.C. App. 50, 57, 373 S.E.2d 681, 686 (1988). Thus, Special Agent Pintacuda's testimony identifying the evidence as marijuana based on his in-court visual identification was properly before the jury.

Most significantly, during the search of the car and residence, and at trial, Defendant admitted that the evidence found was marijuana and that he was selling it. This evidence establishes Defendant's guilt beyond a reasonable doubt. Therefore, Defendant was not prejudiced by the admission of Special Agent Pintacuda's testimony regarding the SBI's chemical analysis and Defendant's argument to the contrary is dismissed.

**B. Jury Instruction**

**[2]** Defendant's second argument on appeal is that the trial court committed reversible error when it charged the jury with an instruction that varied from the language of the indictment. The pertinent indict-

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ment charged Defendant with maintaining a dwelling house “for keeping and selling a controlled substance.” (Emphasis added.) The trial court, over Defendant’s objection, instructed the jury that to find Defendant guilty of the charge the State must prove that Defendant “maintained a dwelling house used for the purpose of unlawfully keeping or selling marijuana.” (Emphasis added.) Defendant argues that this discrepancy between the indictment and the jury instruction was prejudicial error as he relied upon the language of the indictment to construct his defense and it permitted the jury to convict him on an abstract theory not supported by the indictment. We must disagree.

“Our Court reviews a trial court’s decisions regarding jury instructions *de novo*. ‘The prime purpose of a court’s charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence.’” *State v. Smith*, — N.C. App. —, —, 696 S.E.2d 904, 911 (2010) (citation omitted).

In support of his argument, Defendant attempts to distinguish *State v. Anderson* in which this Court rejected a similar claim. 181 N.C. App. 655, 664-65, 640 S.E.2d 797, 804 (holding it was not plain error for the trial court to instruct the jury that the defendant could be convicted of kidnapping based on the theories of confining, restraining, or removing the victim where the indictment charged the defendant with “confining and restraining and removing” the victim) (emphasis added), *cert. denied*, 361 N.C. 430, 648 S.E.2d 846 (2007). Because the *Anderson* Court’s brief opinion relied upon the analysis of the same issue in *State v. Lancaster*, the reasoning outlined in *Lancaster* is instructive for the present case. 137 N.C. App. 37, 46, 527 S.E.2d 61, 67, *disc. review denied in part and remanded in part*, 352 N.C. 680, 545 S.E.2d 723 (2000).

“The purpose of the indictment is to put the defendant on notice of the offense with which he is charged and to allow him to prepare a defense to that charge.” *Id.* at 48, 527 S.E.2d at 69. In *Lancaster*, the State utilized the conjunctive “and” in the indictment to charge the defendant with three theories of kidnapping—“confining, restraining and removing” the victim—while the jury instruction permitted a conviction if the jury found defendant confined, restrained or removed his victim. *Id.* at 46, 527 S.E.2d at 67-68 (emphasis added). The *Lancaster* Court distinguished prior decisions wherein one theory of the crime was alleged in the indictment while a different or other the-

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ories were put before the jury.<sup>1</sup> *Id.* at 47, 527 S.E.2d at 68. Such additional theories in the jury instruction, the Court concluded, were abstract theories not supported by the indictment and it was prejudicial error for the jury to consider them. *Id.* The three theories in the *Lancaster* indictment, however, were the same three theories presented to the jury. *Id.* Thus, the defendant's conviction was supported by the indictment and there was no error. *Lancaster*, 137 N.C. App. at 47, 527 S.E.2d at 68.

The defendant in *Lancaster* also argued that by utilizing "and" to connect the three kidnapping theories in his indictment the State was required to prove the defendant used all three theories in commission of the crime. *Id.* at 48, 527 S.E.2d at 69. The *Lancaster* Court rejected this argument as well, explaining that because an indictment for kidnapping need only allege one statutory theory for the commission of the crime, the fact that the indictment alleged additional theories was not error.<sup>2</sup> *Id.* Rather, the indictment served to put the defendant on notice that the State intended to prove the defendant was guilty via one of the three theories. *Id.* at 48, 527 S.E.2d at 69. Therefore, the use of the disjunctive "or" in the jury instruction properly placed before the jury the three kidnapping theories alleged in the indictment and did not require the State to prove all three theories to support a conviction. *Id.*

We cannot discern any material distinction between *Lancaster* and the present case. Defendant's indictment charged that he maintained a dwelling house "for keeping and selling a controlled substance." (Emphasis added.) Defendant contends he relied upon the language of the indictment to prepare his defense in which he conceded to maintaining his dwelling to *possess* marijuana, but he denied he did so for the purpose of *selling* the marijuana. The jury

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1. See *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986) (holding plain error resulted where indictment charged the defendant with "removing" victim, but jury instruction permitted conviction for "restraining" the victim); *State v. Dominee*, 134 N.C. App. 445, 451, 518 S.E.2d 32, 35 (1999) (holding plain error resulted where indictment alleged kidnapping by "removing" victim, but jury instruction provided for conviction based on "confining, restraining, or removing").

2. See *State v. Birdsong*, 325 N.C. 418, 423, 384 S.E.2d 5, 8 (1989) ("[T]hat the State alleged two factual underpinnings for, or factual theories of [alleged failure to discharge official duties], conviction did not require it to prove both."); *State v. Gray*, 292 N.C. 270, 293, 233 S.E.2d 905, 920 (1977) ("Where an indictment [for first degree rape] sets forth conjunctively two means by which the crime charged may have been committed, there is no fatal variance between indictment and proof when the state offers evidence supporting only one of the means charged.")

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instruction, however, permitted a conviction if the State had proven Defendant maintained his dwelling to either keep or sell marijuana. Under *Lancaster*, the trial court did not err when instructing the jury. We are bound by prior opinions of this Court. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”). Accordingly, we must conclude that *Lancaster* is controlling and we dismiss Defendant’s claim.

**C. Trial Court’s Refusal to Find Mitigating Factors**

[3] Defendant’s third and final argument on appeal is that the trial court abused its discretion in refusing Defendant’s request for a mitigated sentence despite uncontroverted evidence of mitigating circumstances. We disagree.

Section 15A-1340.16 of the North Carolina General Statutes states that a trial court “shall consider evidence of aggravating or mitigating factors,” however, “the decision to depart from the presumptive range is in the discretion of the court.” N.C. Gen. Stat. § 15A-1340.16 (2009). “A trial court’s weighing of mitigating and aggravating factors will not be disturbed on appeal absent a showing that there was an abuse of discretion.” *State v. Rogers*, 157 N.C. App. 127, 129, 577 S.E.2d 666, 668 (2003).

During the sentencing hearing, Defendant presented uncontradicted evidence of the following mitigating factors pursuant to section 15A-1340.16(e): Defendant was suffering from a physical condition that significantly reduced Defendant’s culpability; Defendant voluntarily acknowledged wrongdoing early in the criminal process; Defendant accepted responsibility for his criminal conduct; Defendant supports his family; and Defendant has a support system in the community. N.C. Gen. Stat. § 15A-1340.16(e)(3), (11), (15), (17), and (18). The trial court, however, sentenced Defendant within the presumptive range of authorized sentences.

Defendant’s reliance on our case law in support of his claim is misplaced. Defendant cites to *State v. Jones*, 309 N.C. 214, 218-19, 306 S.E.2d 451, 454 (1983), as requiring the trial court to find a mitigating factor when evidence of such factor is “uncontradicted, substantial, and there is no reason to doubt its credibility . . . .” *Jones*, however, addressed a sentence imposed in the aggravated range, not the pre-

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sumptive range as in the present case. *Id.* at 215, 306 S.E.2d at 453. Additionally, *Jones* was decided under the Fair Sentencing Act, N.C. Gen. Stat. §§ 15A-1340.1 to -1340.7 (*Id.* at 219, 306 S.E.2d at 454), which was repealed effective 1 October 1994 and succeeded by the Structured Sentencing Act, N.C. Gen. Stat. §§ 15A-1340.10 to -1340.33. 1993 N.C. Sess. Laws ch. 538, § 56; 1994 N.C. Sess. Laws ch. 24, § 14(a), (b). Under the Structured Sentencing Act, “[t]he court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences . . . .” N.C. Gen. Stat. § 15A-1340.16(c) (2009); *State v. Dorton*, 182 N.C. App. 34, 43, 641 S.E.2d 357, 363, *disc. review denied*, 361 N.C. 571, 651 S.E.2d 225 (2007). This is so even if the evidence of mitigating factors is uncontested. *Id.*

It is clear from the record that Defendant offered uncontested evidence of mitigating factors to the court. It is also clear that the trial court gave much consideration to this evidence during the sentencing hearing. That the trial court did not, however, find any mitigating factors and chose to sentence Defendant in the presumptive range was squarely in its discretion. We find no error and dismiss Defendant’s claim.

**III. Conclusion**

After a careful review of the record, we conclude that the admission of the State’s forensic laboratory report, identifying the confiscated evidence as marijuana, without affording Defendant the opportunity to cross-examine the analyst who prepared the report violated Defendant’s Sixth Amendment Confrontation Clause rights. In light of the additional evidence of Defendant’s guilt, however, this error did not rise to the level of plain error. Additionally the trial court did not err by charging the jury with an instruction that deviated from the language of the indictment as it placed before the jury the criminal theories alleged in the indictment and thus properly supported Defendant’s conviction. Nor did the trial court abuse its discretion by sentencing Defendant in the presumptive range after considering Defendant’s evidence of mitigating factors. Accordingly, we conclude Defendant received a fair trial and we leave the trial court’s order undisturbed.

No Error.

Judges HUNTER, Robert C., and LEWIS concur.

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STATE OF NORTH CAROLINA v. ROGER GENE MOORE, DEFENDANT

No. COA10-764

(Filed 15 February 2011)

**1. False Pretense—renting out another's house—evidence sufficient**

There was sufficient evidence that defendant obtained property by false pretenses by purporting to rent a house that he did not own. Although defendant argued that the two renters were not deceived because defendant told them not to let anyone know that they were staying at the house, evidence not favorable to the State is not considered when ruling on a motion to dismiss.

**2. Appeal and Error—preservation of issues—restitution—preserved without objection**

An award of restitution is deemed preserved for appellate review even without a specific objection.

**3. Sentencing—restitution—renting out another's property—restitution to owner**

There was no error in an award of restitution to a property owner after defendant was convicted of obtaining property by false pretenses by renting the property as if he owned it. Although defendant's fraudulent representations were made against the renter, the homeowner was harmed as a direct and proximate result.

**4. Sentencing—restitution—amount—evidence not sufficient**

The trial court erred in the amount of restitution ordered where the amount was supported only by an unverified worksheet. The trial court's award amounted to punishment instead of compensation.

**5. Sentencing—form not marked—clerical error—presumptive sentence**

The trial court's failure to mark a box on the judgment and commitment form was mere clerical error where defendant's sentence fell within the presumptive range.

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Judge BRYANT concurring in part and dissenting in part.

Appeal by defendant from judgment entered 4 February 2010 by Judge Laura Bridges in Superior Court, Buncombe County. Heard in the Court of Appeals 30 November 2010.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Terence D. Friedman, for the State.*

*Carol Ann Bauer, for defendant-appellant.*

STROUD, Judge.

Roger Gene Moore (“defendant”) appeals from the trial court’s order sentencing him for conviction for obtaining property by false pretense and ordering him to pay court costs, restitution, and attorney’s fees. For the following reasons, we vacate the trial court’s order for restitution and find no error in defendant’s trial.

### I. Background

On 5 October 2009, defendant was indicted for obtaining property by false pretense for purporting to rent a house to a tenant when he did not actually own the property. Defendant was tried on this charge at the 2 February 2010 Criminal Session of Superior Court, Buncombe County. The evidence presented at trial tended to show the following. Defendant is the former brother-in-law of Tanya McCosker. Ms. McCosker’s husband Clayton Moore (defendant’s brother) owned a piece of real property in Woodfin, North Carolina, consisting of a small house and lot (“the house”). Clayton Moore died in 2003 without a will. Subsequently, Ms. McCosker and other members of the Moore family deeded their ownership interests in the house to her and Clayton’s seventeen-year-old son, Dale Moore on 21 August 2003. Ms. McCosker testified that significant improvements had been made to the interior of the house in 2003 and 2004, including new cabinets, carpet, and paneling, and that she had planned to rent the house to a tenant but had never done so. Defendant owned a piece of real property adjacent to the house. Because Ms. McCosker lived eight or nine miles from the house and it was “out of the way,” she did not drive by the house on a regular basis.

In January 2009, she arrived at the house to find its front screen door and front windows broken. The interior of the house had been

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damaged, as the cabinets had been taken down, the walls were “dented[,]” there was a hole in the floor, the carpet was stained, there was “trash everywhere,” and sewage had backed up into the bathtub. Ms. McCosker called the police and reported a break-in. Ms. McCosker found and handed to the responding officer a piece of paper in the house showing that a registered sex offender named Michael Alan Wilson had listed the house as his address. The responding officer also found paper in the house bearing the name Frederick Phythian<sup>1</sup>. The officer also testified that he had been called to the house in 2005 or 2006 and had not witnessed any breakage to the house nor any odors. A police detective located Mr. Wilson at a homeless shelter and interviewed him.

Mr. Wilson testified that defendant allowed him and Mr. Phythian to stay in the house briefly without paying rent, but they had remained there for less than one week. Later, in August 2007, defendant allowed them to rent the house for \$300 per month. Mr. Wilson and Mr. Phythian rented the house until December 2007 when they moved out again. They returned to the house in April 2008 and stayed for about six weeks before moving out permanently. Mr. Wilson described the house as lacking power, running water, heat, and a sewage system. Mr. Wilson testified that Mr. Phythian paid the rent from a Social Security disability check and that he was not aware of any receipts issued by defendant to Mr. Phythian. Mr. Wilson stated that Mr. Phythian had made a total of five rental payments of \$300 each, one each month September through December 2007 and another in April 2008. Mr. Phythian was in another room at the courthouse but did not testify due to hygiene problems resulting from a lack of bathing. At the close of the State’s evidence, defendant moved to dismiss, and the trial court denied defendant’s motion.

Defendant’s other brother, Rick Moore, testified that he owned property near the house and he passed by the house several times a week. Mr. Moore had never realized anyone was renting it, although he had never gone inside to see whether it was occupied. Mr. Moore testified that he had seen Mr. Wilson on his own property before and had to ask him to leave. Defendant testified that he had never given Mr. Wilson and Mr. Phythian permission to stay in the house nor accepted any money from them. Instead, he stated that he had asked

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1. The indictment and the handwritten statement Wilson gave to police in January 2009 use the spelling “Phythian.” However, the spelling “Prythian” is used in the trial transcript.

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the two men to leave the house five or six times. Defendant moved to dismiss at the close of all evidence and the trial court again denied the motion.

A jury found defendant guilty of obtaining property by false pretenses. The trial court sentenced defendant to a term of six to eight months in prison, suspended on condition of supervised probation. The trial court also ordered defendant to pay \$245.50 in court costs, \$39,332.49 in restitution for the damage to the house, and \$2,336.87 in attorney's fees. Defendant appeals.

**II. Defendant's motions to dismiss**

[1] Defendant first argues the trial court erred in denying his motions to dismiss based on insufficiency of the evidence. We have stated that “[t]he denial of a motion to dismiss for insufficient evidence is a question of law, . . . which this Court reviews *de novo*[.]” *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted). Further,

[w]hen ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. Any contradictions or conflicts in the evidence are resolved in favor of the State, . . . and evidence unfavorable to the State is not considered. The trial court must decide only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

*State v. Miller*, 363 N.C. 96, 98-99, 678 S.E.2d 592, 594 (2009) (quotation marks and citations omitted).

Obtaining property by false pretenses is defined as: “(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.” *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980); N.C. Gen. Stat. § 14-100 (2009). In his brief, defendant acknowledges that the State's evidence showed defendant received money for rental of the house from Mr. Phythian and defendant did not own the house or have the right to rent it on the owner's behalf. This evidence fulfills each element of the offense: defendant falsely and intentionally represented to Mr. Wilson and Mr. Phythian that the

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house was his to let, and this representation did deceive the two men who in turn paid rent to defendant. In his brief, defendant suggests that the evidence was insufficient because Mr. Wilson testified that defendant told him and Mr. Phythian not to let anyone know they were staying at the house. Defendant suggests this evidence establishes that the two men knew they should not be in the house and, therefore, were not deceived. However, as discussed above, evidence unfavorable to the State is not considered in ruling on a motion to dismiss and any contradictions in the evidence are resolved in the State's favor. *Miller*, 363 N.C. at 98, 678 S.E.2d at 594. Mr. Wilson testified that defendant offered to rent the house to the men and negotiated a rental price, which the men then paid to defendant. This evidence was sufficient for the trial court to allow the case to go to the jury. This argument is overruled.

**III. Restitution**

**[2]** Defendant next contends that the trial court erred in ordering him to pay restitution. We note that even though defense counsel argued for a lesser amount of restitution, defense counsel did not make a specific objection at trial following the trial court's entry of the award of restitution. However, even without defendant's specific objection, "the trial court's entry of an award of restitution . . . is deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18)." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004)<sup>2</sup>.

**[3]** Defendant specifically contends that because the indictment for obtaining property by false pretense lists Frederick Phythian, the renter, and not Dale Moore, the actual homeowner, as the victim, the trial court improperly ordered defendant to pay restitution to the incorrect victim. Essentially, defendant argues that restitution could not be ordered for any person other than Frederick Phythian, since he was identified in the indictment. Though defendant does not fully develop this argument, we address it.

We first note that defendant is not challenging the indictment itself; he does not contend that the indictment identifies the wrong person to whom he was alleged to have made the false representations.

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2. N.C. Gen. Stat. § 15A-1446(d)(18) (2009) states that "[e]rrors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division . . . (18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law."

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In fact, N.C. Gen. Stat. § 14-100 does not require an indictment for obtaining property by false pretenses to identify a specific victim. The statute provides in part

that it shall be sufficient in any indictment for obtaining or attempting to obtain any such money, goods, property, services, chose in action, or other thing of value by false pretenses to allege that the party accused did the act with intent to defraud, *without alleging an intent to defraud any particular person*, and without alleging any ownership of the money, goods, property, services, chose in action or other thing of value; and upon the trial of any such indictment, *it shall not be necessary to prove either an intent to defraud any particular person or that the person to whom the false pretense was made was the person defrauded*, but it shall be sufficient to allege and prove that the party accused made the false pretense charged with an intent to defraud . . . .

N.C. Gen. Stat. § 14-100(a) (2009) (emphasis added). Defendant argues we should nevertheless consider the sufficiency of the indictment under N.C. Gen. Stat. § 15A-1340.34(a), which provides:

When sentencing a defendant convicted of a criminal offense, the court shall determine whether the defendant shall be ordered to make restitution to any victim of the offense in question. For purposes of this Article, the term “victim” means a person directly and proximately harmed as a result of the defendant’s commission of the criminal offense.

N.C. Gen. Stat. § 15A-1340.34(a) (2009). The statute provides that the trial court may order restitution to “any victim,” defined as “a person directly and proximately harmed as a result of the defendant’s commission of the criminal offense.” *Id.*

Our Court has previously held that N.C. Gen. Stat. § 15-1340.34 must be read in conjunction with N.C. Gen. Stat. § 15A-1340.35, which addresses the evidentiary basis for the determination of the amount of restitution. *See State v. Wilson*, 158 N.C. App. 235, 240, 580 S.E.2d 386, 390 (2003) (“Reading the statutory provisions together, the more specific statute explains and provides context for the broad language employed in the section concerning restitution generally. The trial court’s basis for awarding restitution is limited to quantifiable costs, income, and values of the kind set out in N.C. Gen. Stat. § 15A-1340.35.”) N.C. Gen. Stat. § 15A-1340.35 (2009) provides, in pertinent part:

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(a) In determining the amount of restitution, the court shall consider the following: . . . .

(2) In the case of an offense resulting in the damage, loss, or destruction of property of a victim of the offense:

a. Return of the property to the owner of the property or someone designated by the owner; or

b. If return of the property under sub-subdivision (2)a. of this subsection is impossible, impracticable, or inadequate:

1. The value of the property on the date of the damage, loss, or destruction; or

2. The value of the property on the date of sentencing, less the value of any part of the property that is returned . . . .

(b) The court may require that the victim or the victim's estate provide admissible evidence that documents the costs claimed by the victim or the victim's estate under this section. Any such documentation shall be shared with the defendant before the sentencing hearing.

In addition, defendant's restitution was ordered as a special condition of probation. Under N.C. Gen. Stat. § 15A-1343, restitution as a condition of probation is not based upon loss to a "victim" but to an "aggrieved party." The statute provides as follows:

As a condition of probation, a defendant may be required to make restitution or reparation to *an aggrieved party or parties* who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant. When restitution or reparation is a condition imposed, the court shall take into consideration the factors set out in G.S. 15A-1340.35 and G.S. 15A-1340.36.

N.C. Gen. Stat. § 15A-1343(d) (2009) (emphasis added).

Defendant cites no authority, and we find none, which requires that a "victim" of any crime, and particularly of obtaining property by false pretenses, be identified specifically in the indictment before that victim may receive restitution. In fact, as noted above, the indictment need not specifically identify any victim under N.C. Gen. Stat. § 14-100. The statutes which govern both the crime of obtaining property by false pretenses and the determination of restitution make it clear that

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a crime may have more “victims” or “aggrieved parties” than those who might be specifically identified in the indictment. However, in order to give the defendant adequate notice of the restitution sought, N.C. Gen. Stat. § 15A-1340.35(b) provides that, “The court may require that the victim or the victim’s estate provide admissible evidence that documents the costs claimed by the victim or the victim’s estate under this section. Any such documentation shall be shared with the defendant before the sentencing hearing.”

Thus, restitution is not limited to the particular victim named in the indictment. In this case, the homeowner was a victim as defined by N.C. Gen. Stat. § 15A-1340.34. Though defendant’s criminal actions of fraudulent representations were committed against Frederick Phythian, the renter, the homeowner was harmed as a direct and proximate result of defendant’s actions. *See id.* Defendant’s rental of the home without authorization from the true homeowner resulted in damage to the home. Accordingly, defendant’s argument is overruled.

[4] Defendant argues next that the trial court erred in ordering restitution in the amount of \$39,332.49. The only evidence presented as to the amount of damages to the house was Ms. McCosker’s testimony that a “repair person” had estimated that repairs to the house would cost “[t]hirty-something thousand dollars.” Ms. McCosker also testified that she had “submitted to the district attorney’s office an estimate for repairs[.]” The State introduced a restitution worksheet listing damages in the very specific amount of \$39,332.49, and the trial court ordered this same amount as restitution. However, there is no “estimate for repairs” in the record on appeal.

The law is clear that where the defendant has not stipulated to the amount of restitution, the restitution worksheet alone is not sufficient to support an award of restitution. *See State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992) (“In the absence of an agreement or stipulation between defendant and the State, evidence must be presented in support of an award of restitution. Further, it is elementary that a trial court’s award of restitution must be supported by competent evidence in the record. N.C.G.S. § 15A-1343(d); *State v. Easter*, 101 N.C. App. 36, 398 S.E.2d 619 (1990).”). Some cases, such as *State v. Davis*, 167 N.C. App. 770, 607 S.E.2d 5 (2005), uphold orders for restitution in an amount *less* than specific amounts which were supported by the evidence, but we find no cases which uphold an order of restitution in an amount *greater* than that which is supported by the evidence. Because the trial court

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must consider factors other than the actual amount of damages claimed, such as the defendant's ability to pay, the trial court might properly order *less* than the full amount supported by the evidence. N.C. Gen. Stat. § 15A-1340.36(a) (2009) states that,

In determining the amount of restitution to be made, the court shall take into consideration the resources of the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution, but the court is not required to make findings of fact or conclusions of law on these matters. The amount of restitution must be limited to that supported by the record, and the court may order partial restitution when it appears that the damage or loss caused by the offense is greater than that which the defendant is able to pay. If the court orders partial restitution, the court shall state on the record the reasons for such an order.

Ordering restitution in an amount *greater* than the amount supported by the evidence violates the requirement of N.C. Gen. Stat. § 15A-1340.36(a) that "the amount of restitution must be *limited to* that supported by the record . . ." *See id.* (Emphasis added.)

In *State v. Dallas*, — N.C. App. —, 695 S.E.2d 474 (2010), this Court vacated a restitution order because the amount was greater than could be supported by the evidence adduced at trial. The only evidence at trial was that the two vans stolen by the defendant were "worth \$1,200.00 to \$1,400.00[,] but the trial court ordered restitution of \$8,277.00, which was based "on the unverified Restitution Worksheet submitted by the State." *Id.* at —, 695 S.E.2d at 479. Because the restitution order was not "supported by evidence adduced at trial or at sentencing," and "[t]he unsworn statement of the prosecutor is insufficient to support the amount of restitution ordered[.]" the restitution order was vacated. *Id.* (quotation marks omitted).

In *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557, *disc. rev. allowed*, 316 N.C. 554, 344 S.E.2d 11, *aff'd per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986), this Court held that the amount of restitution cannot be based upon "guess or conjecture." *Id.* at 758, 338 S.E.2d at 561. The defendant in *Daye* had stipulated that the evidence as to restitution could be presented by unsworn statements of the district attorney, so this Court's ruling was not based upon the lack of sworn

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testimony as to the amount of restitution. *Id.* at 757-58, 338 S.E.2d at 561. Instead, this Court's ruling was based upon the lack of specificity of the amount. *Id.* The State informed the court as follows regarding the amount of restitution:

THE COURT: Mr. Hunt [district attorney], is there any matter of restitution that should be brought to the attention of the Court?

MR. HUNT: Your Honor, the family indicated to me that they had a \$5,000 life insurance policy on the decedent that was not sufficient to cover the medical—the funeral expenses. They've indicated to me that they were in excess of \$5,000.

THE COURT: Well, then, are you asking me to recommend that the defendant pay in excess of \$5,000? That's not very specific, you know.

MR. HUNT: \$5,000; \$5,000; Your Honor, that would be specific, and that amount would just absorb the amount of the debt.

*Id.* The trial court recommended restitution of \$5,000.00, and this Court vacated the restitution award. *Id.* at 756, 338 S.E.2d at 560. We stated that "we believe there must be something more than a guess or conjecture as to an appropriate amount of restitution. Restitution is not intended to punish defendants, but to compensate victims. There is no predetermined fine or presumption of damages." *Id.* at 758, 338 S.E.2d at 561.

Here, the evidence at trial of "[t]hirty-something thousand dollars" was no more specific than the "guess or conjecture" of \$5,000 in *Daye*. See *id.* at 758, 338 S.E.2d at 561. This case is also similar to *Dallas* in that although there was "some evidence" of the victim's damages, only the unverified restitution worksheet supported the actual amount ordered as restitution by the trial court. See *Dallas*, — N.C. App. at —, 695 S.E.2d at 479. The only mention in the record of a specific amount of \$39,332.49 is on the restitution worksheet, but the worksheet is not evidence which can support the award of restitution. As noted in *Daye*, "Restitution is not intended to punish defendants, but to compensate victims." 78 N.C. App. at 758, 338 S.E.2d at 561. The trial court's award of restitution in these circumstances amounts to punishment instead of compensation based upon the evidence. Accordingly, we vacate the restitution order of \$39,332.49.

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**IV. Mitigated, presumptive or aggravated range sentence**

[5] Lastly, defendant argues that the trial court erred by failing to indicate whether his sentence was in the mitigated, presumptive or aggravated range. Specifically, defendant contends that the judgment and commitment form requires the trial court to indicate that either a sentence is in the presumptive range (Block 1), or that the trial court has made findings of aggravating and mitigating factors (Block 2). Here, the trial court failed to mark either block on the judgment and commitment form, and also did not make any findings regarding aggravating and mitigating factors. However, defendant does not contest his actual sentence of six to eight months for the Class H felony with a record level of I. Defendant's sentence falls in the presumptive range and, thus, no findings were required. *See State v. Chavis*, 141 N.C. App. 553, 568, 540 S.E.2d 404, 415 (2000); N.C. Gen. Stat. § 15A-1340.16(c) (2009). We conclude that the failure of the trial court to mark the appropriate box on the judgment and commitment form was mere clerical error. This argument is overruled.

**NO ERROR IN PART AND VACATED IN PART.**

Judge BEASLEY concurs.

Judge BRYANT concurs in part and dissents in part by separate opinion.

BRYANT, Judge, concurring in part and dissenting in part.

Where the trial court's recommendation as to restitution is supported by some evidence in the record and complies with our statutes and case law, the trial court's order of restitution must be affirmed.

The majority opinion states that the only evidence presented as to the amount of damages was Ms. McCosker's testimony regarding the amount as estimated by a repair person and her testimony that she had submitted an estimate of the repairs to the District Attorney's office. The majority also emphasizes that there is no estimate of repairs in the record. This appears to be the sole factual basis on which the majority relies to support its legal reasoning to vacate the order of restitution. Because I believe the majority opinion contradicts settled law on restitution and would open the door to many frivolous challenges to properly entered orders of restitution, I must respectfully dissent from the portion of the majority opinion

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vacating the trial court's order of restitution. As to the remaining issues, I concur with the majority.

"As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant." N.C. Gen. Stat. § 15A-1343(d) (2009). "Restitution, imposed as a condition of probation, is not a legal obligation equivalent to a civil judgment, but rather an option which may be voluntarily exercised by the defendant for the purpose of avoiding the serving of an active sentence." *State v. Smith*, 99 N.C. App. 184, 186-87, 392 S.E.2d 625, 626 (1990), *cert. denied*, 483 S.E.2d 189 (1997) (citing *Shew v. Southern Fire & Casualty Co.*, 307 N.C. 438, 298 S.E.2d 380 (1983)). "The amount of restitution ordered by the court must be supported by the evidence. The trial court is not required to make specific findings of fact. If there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *State v. Freeman*, 164 N.C. App. 673, 677, 596 S.E.2d 319, 322 (2004) (internal citations and quotation marks omitted).

For example, in *State v. Hunt*, the defendant argued

that the trial court's recommendation of restitution as a condition of work release must be vacated because it is fatally ambiguous and unsupported by the evidence. The victim, Matt Stephens, testified that the hospital bill "is \$10,364" and the doctor's bill "around \$8,000." The court recommended that defendant be required to pay restitution from his work release earnings to "Matt Stephens or Hospital or Doctor to be Determined \$18,364.00. . . ."

80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986). Because there was "some evidence as to the appropriate amount of restitution[,] we found no error. *Id.* Further, "[t]estimony from victims about the value of their [damages], even without receipts or documentation, has been held sufficient to support an order of restitution." *State v. Puckett*, No. COA09-1632, 2010 N.C. App. LEXIS 1088, at 13-14 (July 6, 2010) (unpublished) (citing *State v. Cousart*, 182 N.C. App. 150, 154-55, 641 S.E.2d 372, 375 (2007) and *Hunt*).

Here, Ms. McCosker testified that she had received a repair estimate in the amount of "thirty-something thousand dollars," and that she gave an estimate of that cost to the District Attorney's office.

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Further, the transcript of the sentencing hearing in the record on appeal reflects the following:

[Prosecutor]: Your Honor, I'd approach with the gold sheet which shows he is a Level I for felony sentencing. I'm also passing up a restitution worksheet drawn up our office in the amount of thirty-nine thousand three hundred thirty-two dollars and forty-nine cents. You've heard the evidence. They've testified. If you'd like to hear from them, I'd be happy, but the State would rest on the evidence we put forth.

Court: All right.

...

Court: This sentence is suspended and the defendant placed on supervised probation for sixty months, and the sixty months is because of the large amount of restitution. He will pay thirty-nine thousand three hundred thirty-two dollars and forty-nine cents in restitution to Dale Moore.

While the transcript indicates that defendant's counsel urged the trial court not to impose such a high restitution amount, arguing that the amount should be reflected in a civil judgment, there was no specific objection to the worksheet. Thus, the amount of restitution awarded by the trial court was consistent with both Ms. McCosker's testimony and the worksheet presented by the State. The testimony and worksheet constitute "some evidence as to the appropriate amount of restitution," and, therefore, "the recommendation will not be overruled on appeal." *Freeman*, 164 N.C. App. at 677, 596 S.E.2d at 322 (*citing Hunt*, 80 N.C. at 195, 341 S.E.2d at 354). For these reasons, I would affirm the trial court's award of restitution.

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SPEEDWAY MOTORSPORTS INTERNATIONAL LTD., PLAINTIFF V. BRONWEN ENERGY TRADING, LTD., BRONWEN ENERGY TRADING UK, LTD., DR. PATRICK DENYEFA NDIOMU, BNP PARIBAS (SUISSE) SA, BNP PARIBAS S.A., SWIFT AVIATION GROUP, INC., SWIFT AIR, LLC, SWIFT AVIATION GROUP, LLC, AND SWIFT TRANSPORTATION CO., INC., DEFENDANTS

No. COA09-558

(Filed 15 February 2011)

**Jurisdiction— forum selection clause—letter of credit transactions independent**

The trial court did not err by denying defendant French Bank's motion to dismiss plaintiff's claims based on a forum selection clause contained in a supplemental guarantee requiring that all litigation take place in Geneva, Switzerland. Defendant conceded that no agreement existed between the two parties containing a forum selection clause even though defendant contended that it should be deemed a third-party beneficiary. Contracts relating to a letter of credit transaction are independent, and thus, the supplemental agreement from plaintiff to defendant Swiss Bank was separate and distinct from the demand guarantee from defendant Swiss Bank to defendant French Bank.

Appeal by defendant from order entered 21 January 2009 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 October 2009.

*Parker Poe Adams & Bernstein LLP, by Michael G. Adams and William L. Esser IV, for plaintiff-appellee.*

*Bell, Davis & Pitt, P.A., by William K. Davis, Edward B. Davis, and Michael D. Phillips, for defendant-appellant BNP Paribas S.A.*

GEER, Judge.

Defendant BNP Paribas S.A. ("BNPP France") moved to dismiss claims asserted against it by plaintiff Speedway Motorsports International Ltd. ("SMIL") on the grounds that SMIL was bound by a forum selection clause requiring that all litigation take place in Geneva, Switzerland. BNPP France appeals from the trial court's denial of that motion. BNPP France concedes that no agreement

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exists between it and SMIL containing a forum selection clause, but contends that it should be deemed a third party beneficiary of a contract containing the Geneva forum selection clause.

Because this commercial dispute arises out of letter of credit transactions, we are bound by the well-established principle that contracts related to a letter of credit transaction are independent. We cannot accept BNPP France's invitation that we view two contracts as "intertwined" despite the controlling law that they are "independent." We, therefore, affirm the trial court's denial of BNPP France's motion to dismiss.

Facts

In 2006, SMIL, which is "in the business of petroleum products transactions," opened an account with BNP Paribas (Suisse) SA ("BNPP Suisse") to conduct that business. This case arises out of SMIL's use of its BNPP Suisse account in connection with a series of contracts pursuant to which SMIL agreed to guarantee lines of credit issued to finance petroleum purchases by other parties during 2007.

In early 2007, defendants Swift Aviation Group, Inc., Swift Air, LLC, Swift Aviation Group, LLC, and Swift Transportation Co., Inc. (collectively "Swift") were attempting to negotiate a long-term supply contract with Kuwait Petroleum Corporation ("KPC") pursuant to which Swift would purchase petroleum products from KPC. KPC was not, however, willing to enter into a long-term business relationship with Swift until Swift had proven its ability to successfully execute shorter-term spot contracts.

Upon the advice of BNPP France, Swift engaged defendants Bronwen Energy Trading, Ltd. and Bronwen Energy Trading UK, Ltd. (collectively "Bronwen") to assist Swift in executing the spot contracts with KPC. SMIL, which is headquartered in Charlotte, North Carolina, agreed to provide Bronwen with the financial assistance needed to obtain letters of credit for the purchase of the oil under the spot contracts.

On 12 July 2007, Bronwen and SMIL entered into an agreement relating to the delivery of 80,000 metric tons of Jet A-1 ("the First Oil Contract"). Under the First Oil Contract, SMIL agreed to provide BNPP France with a guarantee of \$12,750,000.00 to allow Bronwen to secure from BNPP France one or more letters of credit to effectuate the purchase of the Jet A-1 from KPC. SMIL and Bronwen also agreed: "The funded amount guaranteed will be maintained in SMIL's account

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with [BNPP Suisse]. SMIL will execute such document(s) as reasonably required by [BNPP France] to effectuate the guarantee of the funded amount.”

To fulfill its obligations under the First Oil Contract, SMIL executed a guarantee (“the Corporate Guarantee”) to BNPP France later that day. The next day, 13 July 2007, SMIL’s president, William R. Brooks, also emailed the Corporate Guarantee to BNPP Suisse. BNPP France rejected as insufficient SMIL’s Corporate Guarantee on 13 July 2007 and requested that SMIL instead issue instructions to BNPP Suisse to deliver a first demand guarantee to BNPP France.

Accordingly, later that day, 13 July 2007, SMIL sent instructions (“the First Instructions”) to BNPP Suisse to issue a first demand guarantee of \$11,750,000.00 in favor of BNPP France with respect to the fulfillment of the First Oil Contract. The First Instructions stated: “[Bronwen] has a financing facility for principal amount of \$100,000,000 USD which has been granted by [BNPP France] pursuant to an agreement dated [sic] 13 December 2006 (the ‘Credit Facility’). SMIL has a business relationship with [Bronwen] pursuant to a separate agreement, a true and correct copy of which is attached hereto as Exhibit A, and which is incorporated herein by reference. The Guarantee is to be issued solely with respect to any amounts drawn by [Bronwen] pursuant to the Credit Facility in [Bronwen’s] fulfillment of Exhibit A. SMIL will maintain a sufficient amount in its account with [BNPP Suisse] to satisfy the Guarantee.” Exhibit A was a copy of the First Oil Contract executed the day before on 12 July 2007.

After SMIL sent the First Instructions to BNPP Suisse, but still on 13 July 2007, SMIL and Bronwen entered into an amended oil contract (“Amended Oil Contract”), which, by its terms, “supersede[d]” the First Oil Contract executed the previous day. The Amended Oil Contract reduced to \$11,750,000.00 the amount guaranteed by SMIL to BNPP France for Bronwen’s benefit. Like the First Oil Contract, it provided that the guaranteed amount would be maintained in SMIL’s account with BNPP Suisse.

Three days later, on 16 July 2007, BNPP Suisse acknowledged receipt of the First Instructions, but it informed SMIL that it “need[ed] a request with the actual wording of the guarantee” BNPP Suisse was to issue to BNPP France, as opposed to the more general wording of the First Instructions. BNPP Suisse included a draft of a first demand guarantee for SMIL’s review. In addition to referencing the purchase by Bronwen of 80,000 metric tons of Jet A-1, as gov-

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erned by the First Oil Contract and the Amended Oil Contract, the draft also referred to a purchase of 60,000 metric tons of Gasoil from KPC. The last line of the first demand guarantee stated: "This guarantee is subject to Swiss Law, place of jurisdiction is Geneva."

Later that day, SMIL emailed BNPP Suisse a revised version of the first demand guarantee. The revised version was substantially similar to BNPP Suisse's draft. It confirmed that SMIL agreed to be responsible for Bronwen's repayment of the \$11,750,000.00 credit issued to KPC, pursuant to the Amended Oil Contract, and it included the Geneva forum selection clause. It deleted the reference to the 60,000 metric tons of Gasoil that was not part of the Amended Oil Contract. SMIL's president, Mr. Brooks, signed the document after adding the following sentence: "All claims are to be sent to my attention at [Mr. Brooks' email address], and by fax to [Charlotte, North Carolina fax number]." SMIL also noted in its email attaching the revised "guarantee form" that it had also attached "a superseding agreement [the Amended Oil Contract] between [SMIL] and [Bronwen] that is to be used in substitution for the Exhibit A [SMIL] originally sent to [BNPP Suisse]."

On appeal, the parties do not agree on the purpose or effect of the 16 July 2007 draft of the first demand guarantee sent by Mr. Brooks to BNPP Suisse. BNPP Suisse refers to the document as an actual guarantee by SMIL in favor of BNPP Suisse. SMIL insists that this draft of the first demand guarantee was merely an "Approval Document" that was approving the form of the first demand guarantee BNPP Suisse was going to send to BNPP France. SMIL contends that this Approval Document, which contained the Geneva forum selection clause, was not intended to supersede the First Instructions. In SMIL's second amended complaint, however, SMIL referred to the 16 July 2007 document as the "Supplemental Guarantee." For purposes of this opinion, we will adopt SMIL's description of this document and refer to it as the "Supplemental Guarantee."

Meanwhile, also on 16 July 2007 (but apparently before BNPP Suisse received SMIL's response with the Supplemental Guarantee), BNPP Suisse went ahead and issued a first demand guarantee to BNPP France by which BNPP Suisse promised that it would be responsible for Bronwen's repayment of the letters of credit to BNPP France. The first demand guarantee referenced both the 80,000 metric tons of Jet A-1 and the 60,000 metric tons of Gasoil, and it contained the Geneva forum selection clause.

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Subsequently, on 19 July 2007, Bronwen and SMIL entered into a second oil contract (“the Second Oil Contract”). Under the Second Oil Contract, SMIL agreed to provide a first demand guarantee to BNPP France for an additional \$4,000,000.00 to allow Bronwen to secure letters of credit to effectuate the purchase of 68,000 metric tons of Gasoil. Like the First and Amended Oil Contracts, it provided that the guaranteed amount would be maintained in SMIL’s account with BNPP Suisse.

On 23 July 2007, pursuant to the Second Oil Contract, SMIL sent BNPP Suisse new instructions (“the Second Instructions”) directing BNPP Suisse to increase the amount of the first demand guarantee in favor of BNPP France by \$4,000,000.00, bringing the total amount to \$15,750,000.00. The Second Instructions stated: “SMIL has new business with [Bronwen] pursuant to a separate agreement [the Second Oil Contract], a true and correct copy of which is attached hereto as Exhibit A, and which is incorporated herein by reference. The additional \$4,000,000 of the Guarantee is to be issued solely with respect to any amounts drawn by [Bronwen] pursuant to the Credit Facility in [Bronwen’s] fulfillment of Exhibit A.”

Approximately two weeks later, on 7 September 2007, Bronwen and SMIL entered into yet another contract (“the Third Oil Contract”). Under the Third Oil Contract, SMIL agreed to provide a first demand guarantee to BNPP France in the amount of \$12,000,000.00 to allow Bronwen to secure letters of credit to effectuate the purchase of three shipments of 65,000 metric tons of Gasoil each. Like the previous Oil Contracts, the Third Oil Contract provided that the guaranteed amount would be maintained in SMIL’s account with BNPP Suisse.

The same day, SMIL sent BNPP Suisse instructions (“the Third Instructions”) directing BNPP Suisse to reduce the amount of the first demand guarantee to \$12,000,000.00. The Third Instructions stated: “SMIL has new business with [Bronwen] pursuant to a separate agreement [the Third Oil Contract], a true and correct copy of which is attached hereto as Exhibit A, and which is incorporated herein by reference. The \$12,000,000 Guarantee is to be issued solely with respect to any amounts drawn by [Bronwen] pursuant to the Credit Facility in [Bronwen’s] fulfillment of Exhibit A.”

A week later, on 14 September 2007, SMIL sent BNPP Suisse “updated” instructions (“the Fourth Instructions”). The Fourth Instructions reiterated the \$12,000,000.00 amount of the first demand

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guarantee and stated: "This Guarantee will cover all current business SMIL has with [Bronwen] pursuant to separate agreements [the Amended, Second, and Third Oil Contracts], true and correct copies of which are attached hereto as Exhibit A, and which are incorporated herein by reference. The \$12,000,000 Guarantee is to be issued solely with respect to any amounts drawn by [Bronwen] pursuant to the Credit Facility in [Bronwen's] fulfillment of the contracts attached as Exhibit A."

In early November 2007, BNPP France determined that losses related to the Oil Contracts exceeded \$17,000,000.00. BNPP France notified Bronwen and SMIL that BNPP France believed it had a right to draw on SMIL's account at BNPP Suisse to cover its losses. SMIL disputed this claim, reminding BNPP France that the first demand guarantee only covered letters of credit issued to effectuate purchase of oil under the Oil Contracts and insisting that Bronwen's debt was not related to the purchase price of oil under the pertinent Oil Contracts. Because BNPP France nonetheless maintained that it had a right to draw on the first demand guarantee, SMIL announced on 6 November 2007 that it was terminating the first demand guarantee. The next day, however, BNPP Suisse notified SMIL that it had received a demand from BNPP France. Despite SMIL's protest, BNPP Suisse paid BNPP France \$12,000,000.00 on 9 November 2007 and immediately debited SMIL's account for that amount.

SMIL filed a complaint on 22 April 2008, an amended complaint on 29 May 2008, and a second amended complaint on 25 September 2008, asserting claims for, *inter alia*, breach of contract against Bronwen and Swift; wrongful honor against BNPP Suisse; fraud and negligent misrepresentation against BNPP France; breach of demand guarantee and conversion against BNPP Suisse and BNPP France; equitable subrogation to BNPP France's claims against Bronwen and Swift; and unfair and deceptive trade practices against all defendants. SMIL also asserted that it was entitled to an accounting from all defendants.

BNPP France moved to dismiss SMIL's claims against BNPP France on the grounds that (1) the court lacked personal jurisdiction over BNPP France, (2) SMIL's claims arose out of an express guarantee that any claims must be litigated in Geneva, Switzerland, and (3) SMIL had failed to state a claim against BNPP France. Before the trial court decided BNPP France's motion, SMIL moved to amend its complaint. The court granted SMIL's motion, and SMIL filed its second

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amended complaint on 25 September 2008. BNPP France subsequently filed a revised motion to dismiss, dropping its challenge to personal jurisdiction, but maintaining that the suit must be litigated in Geneva, Switzerland and that SMIL had failed to state a claim against BNPP France.

On 21 January 2009, the Business Court entered an order granting in part and denying in part BNPP France's motion to dismiss. The order contained no findings of fact but decreed that the court:

1. DENIES the Motion to Dismiss based on the purported existence of mandatory forum selection provisions in two contract documents requiring trial of the parties' dispute in Geneva, Switzerland, as the Court (without deciding whether, in fact, the provisions are mandatory) concludes that these parties are not bound by these provisions;
2. GRANTS the Motion to Dismiss for failure to state a claim as to [SMIL's] Fourth Claim for Relief alleging breach of contract, as the Court finds as a matter of law that [SMIL] has failed to allege the existence and breach of any contract between [SMIL] and [BNPP France]; and
3. DENIES the Motion to Dismiss for failure to state a claim as to the remaining claims alleged by [SMIL].

BNPP France appealed the order to this Court.

### Discussion

On appeal, BNPP France contends only that the trial court erred in concluding that SMIL is not bound by the Geneva forum selection clause contained in the Supplemental Guarantee.<sup>1</sup> Although SMIL vigorously argues that the Supplemental Guarantee was not a guarantee from SMIL to BNPP Suisse but rather was simply approving the form of the guarantee to be issued by BNPP Suisse to BNPP France, we assume, without deciding, for purposes of this appeal, that this document was a binding guarantee provided by SMIL to BNPP Suisse.

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1. Although this appeal is interlocutory, it is properly before the Court because it involves a substantial right that would be lost in the absence of an immediate appeal. *See Cable Tel Servs., Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 641, 574 S.E.2d 31, 33 (2002) ("North Carolina case law establishes firmly that an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right that would be lost." (internal quotation marks omitted)).

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The Supplemental Guarantee was emailed by Mr. Brooks to BNPP Suisse in Geneva. It initially stated: "This is to confirm you [sic] that we hereby irrevocably guarantee and agree to be answerable and responsible towards you for the due repayment by [Bronwen] of the Credit Facilities limited to the issuance of one or several documentary credits for the purchase from Kuwait Petroleum Corporation ("KPC") of 80'000 metric tons +/- 10 pct of Jet A-1 (Contract reference S/MD/K/080/07) you have granted or will grant to them in your books . . ." The Supplemental Guarantee was limited to \$11,750,000.00 and further provided that payment of any amount claimed up to that limit would be made "in accordance with your instructions without any objection or entering into an argument and without any previous notice of dishonour or any other notice, upon receipt by us of your first demand by duly authenticated swift message certifying that the amount you are claiming from us on the strength of our present guarantee is due to you by [Bronwen] as a result of their failure to repay you said sum within the time fixed by you."

The Supplemental Guarantee stated that it would remain valid until 5:00 p.m. on 15 September 2007 and that "in the event of no claim being received by us hereunder on or prior to 15 September 2007, our present undertaking will be of right null and void after that date."<sup>2</sup> All claims were to be sent to "my attention" at an email address belonging to Mr. Brooks, SMIL's president, and by fax to a Charlotte, North Carolina fax number. The Supplemental Guarantee closed with a final provision: "This guarantee is subject to Swiss Law, place of jurisdiction is Geneva[.]". It was then signed by Mr. Brooks.

There is no dispute that the Supplemental Guarantee, if a binding agreement, was an agreement between SMIL and BNPP Suisse. BNPP France chose to reject SMIL's Corporate Guarantee made directly to BNPP France and insisted, instead, that SMIL arrange for BNPP Suisse to issue a first demand guarantee to BNPP France. BNPP France explains in its brief: "SMIL executed a guarantee to [BNPP] Suisse, which, in turn, issued a guarantee to BNPP France. The Guarantees contain identical forum selection and choice of law provisions that state clearly and unequivocally: 'THIS GUARANTEE IS SUBJECT TO SWISS LAW, PLACE OF JURISDICTION IS GENEVA.' "

BNPP France concedes that SMIL did not enter into any agreement directly with BNPP France that included a forum selection clause.

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2. The parties disagree regarding the effect of the expiration date. We again assume, without deciding, that the Supplemental Guarantee remained in effect.

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BNPP France argues, however, that it was entitled to the benefit of the Geneva forum selection clause in the Supplemental Guarantee because the Supplemental Guarantee and the First Demand Guarantee from BNPP Suisse to BNPP France were “inextricably intertwined, manifesting SMIL’s intent and expectation to be bound by the Geneva forum selection clause contained in both Guarantees.”

Understanding the nature of demand guarantees is critical to a resolution of BNPP France’s appeal. A “guarantee” by a bank—a term primarily used in international commerce and banking—is the functional equivalent of a standby letter of credit. *See* David J. Barru, *How to Guarantee Contractor Performance on International Construction Projects: Comparing Surety Bonds with Bank Guarantees and Standby Letters of Credit*, 37 Geo. Wash. Int’l L. Rev. 51, 65 (2005) (“The term ‘guarantee’ is ubiquitous in international commerce and banking. It refers to an instrument that is functionally equivalent to a standby letter of credit.” (internal quotation marks omitted)). As one commentator has explained, “[t]here are a multitude of names that refer to these bank-issued undertakings, including bank guarantees, independent guarantees, independent bank guarantees, international bank guarantees, *demand guarantees*, international demand guarantees, simple demand guarantees, *first-demand guarantees*, performance guarantees, and, in Latin America, *garantia*.” *Id.* (emphasis added).

BNPP Suisse’s “first demand guarantee” to BNPP France was a bank guarantee to which we apply the law of letters of credit. *See* N.C. Gen. Stat. § 25-5-102 cmt. 6 (2009) (“[C]ertain documents labelled [sic] ‘guarantees’ in accordance with European (and occasionally, American) practice are letters of credit.”). *See also* Barru, *supra*, at 63 (“Courts and commentators generally agree that the law of letters of credit applies to bank guarantees.”).

As this Court acknowledged 30 years ago, letters of credit “have been used for centuries to facilitate commercial transactions.” *Sunset Invs., Ltd. v. Sargent*, 52 N.C. App. 284, 286, 278 S.E.2d 558, 560, *disc. review denied*, 303 N.C. 550, 281 S.E.2d 401 (1981). “The very object of a letter of credit is to provide a near foolproof method of placing money in its beneficiary’s hands when he complies with the terms contained in the letter itself—when he presents, for example, a shipping document that the letter calls for or (as here) a simple written demand for payment. Parties to a contract may use a letter of credit in order to make certain that contractual disputes wend their way

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towards resolution with money in the beneficiary's pocket rather than in the pocket of the contracting party." *Itek Corp. v. First Nat'l Bank of Boston*, 730 F.2d 19, 24 (1st Cir. 1984).

This Court has explained: "A letter of credit is an engagement by a bank, a finance company or other issuer made at the request of its customer or some other person who seeks to secure an obligation to a third person which will arise in the future. The engagement is that if certain things are done, either by way of presentation of pieces of paper or simply by making a demand for payment of a draft or acceptance, payment or acceptance will take place." *Sunset Invs.*, 52 N.C. App. at 286-87, 278 S.E.2d at 560-61. Typically, a letter of credit transaction involves three contracts: "1) the contract between the issuer (bank) and the account party (customer) for the issuance of the credit; 2) the letter of credit itself, a contract between the issuer and the beneficiary; and 3) the underlying agreement between the beneficiary and the account party." *Id.* at 287, 278 S.E.2d at 561.

In this case, the first contract was between BNPP Suisse and its customer/account-holder, SMIL. BNPP Suisse agreed to issue the letter of credit to BNPP France on behalf of SMIL. BNPP Suisse chose to ensure that it would be reimbursed by SMIL for any payment made to BNPP France on the letter of credit by obtaining the Supplemental Guarantee from SMIL. BNPP Suisse then entered a contract with BNPP France (the second contract) by issuing the demand guarantee (or letter of credit) to BNPP France, the beneficiary. BNPP France, in turn, issued a letter of credit to finance the Oil Contracts (the third contract)—an agreement conditioned on SMIL's securing that letter of credit by having BNPP Suisse issue the demand guarantee to BNPP France.

As this Court recognized in *Sunset Invs.*, "one bright star" exists regarding letter of credit transactions: "[T]he basic aspect of the successful use of letters of credit lies in recognizing at the threshold that *every letter of credit involves separate and distinct contracts*; and that the contract between the issuing bank and the beneficiary to pay money to the beneficiary upon demand (and documentation if called for) must be kept chaste [and] independent of the underlying contract between the purchaser of the letter and the beneficiary." *Id.* at 288, 278 S.E.2d at 561 (emphasis added). This "basic aspect," *id.*, of letters of credit is known as the "independence principle." See also Barru, *supra*, at 77-78 ("The independence principle, also referred to as the 'autonomy principle' is at the core of letter of credit or bank guarantee law.").

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Phrased differently, this principle establishes that:

the letter of credit or bank guarantee is independent of the underlying contractual commitment—that is, the transaction that the credit is intended to secure—between the applicant and the beneficiary; *the credit is also independent of the relationship between the bank and its customer, the applicant.* The issuing bank is required to pay the beneficiary on proper demand, made in strict conformance with the terms of the guarantee or letter of credit, regardless of actual events surrounding the underlying contract between the beneficiary and the applicant. The bank must likewise pay on proper demand regardless of any dispute with its customer, the applicant, or concern that the customer may default on the underlying reimbursement agreement.

Barru, *supra*, at 78 (emphasis added). This principle has also been included in the Uniform Commercial Code: “Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or non-performance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.” N.C. Gen. Stat. § 25-5-103(d) (2009).

In this case, by insisting that SMIL arrange with BNPP Suisse to have a demand guarantee—or letter of credit—issued from BNPP Suisse to BNPP France, BNPP France obtained “the certainty and speed of payment” that letters of credit ensure. N.C. Gen. Stat. § 25-5-103 cmt. 1. BNPP France would be paid—and was paid—by BNPP Suisse regardless whether BNPP Suisse was reimbursed by SMIL or of the status of the Oil Contracts. See Barru, *supra*, at 78 (“The bank must likewise pay on proper demand regardless of any dispute with its customer, the applicant, or concern that the customer may default on the underlying reimbursement agreement.”). BNPP France thus benefitted from the independence principle.

Now, however, in order to take advantage of the forum selection clause in SMIL’s contract with BNPP Suisse, BNPP France argues that the SMIL/BNPP Suisse contract and the BNPP Suisse/BNPP France contract are “inextricably intertwined.” We cannot reconcile the “independence principle” with BNPP France’s “intertwining” contract theory. These two contracts—because they are part of a letter of credit transaction—are “separate and distinct contracts.” *Sunset Invs.*, 52 N.C. App. at 288, 278 S.E.2d at 561. Any rights and obligations

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of BNPP Suisse to BNPP France— by virtue of the demand guarantee—“are independent of the existence” of the contract or arrangement between SMIL and BNPP Suisse. N.C. Gen. Stat. § 25-5-103(d).

The cases cited by BNPP France as permitting a non-signatory to a contract to enforce a provision in that contract—a third-party beneficiary theory—do not involve the independence principle. BNPP France urged in oral argument that the independence principle is limited to prohibiting BNPP France from refusing to honor its letter of credit because of a dispute between SMIL and Bronwen/Swift. BNPP France has provided this Court with no authority—either in its brief or through a Memorandum of Additional Authority—supporting its contention that the contracts comprising a letter of credit transaction are independent for some purposes, but are not for other purposes. In the absence of such authority, we are unwilling to risk undermining letter of credit transactions.

As the commentary to North Carolina’s version of the Uniform Commercial Code warns, “Only staunch recognition of [the independence] principle by the issuers *and the courts* will give letters of credit the continuing vitality that arises from the certainty and speed of payment under letters of credit. To that end, it is important that the law not carry into letter of credit transactions rules that properly apply only to secondary guarantees or to other forms of engagement.” N.C. Gen. Stat. § 25-5-103 cmt. 1 (emphasis added). *See also Universal Marine Ins. Co. v. Beacon Ins. Co.*, 581 F. Supp. 1131, 1138 (W.D.N.C. 1984) (noting that purpose of “independence principal” is “to preserve the usefulness of the letter of credit as a means of facilitating commercial dealings”).

Accordingly, we reject BNPP France’s contention that it may be a third party beneficiary of the Supplemental Guarantee’s Geneva forum selection clause. We hold that the independence principle governing letters of credit dictates that the Supplemental Guarantee from SMIL to BNPP Suisse is separate and distinct from the demand guarantee from BNPP Suisse to BNPP France. BNPP France has, therefore, failed to demonstrate that SMIL is subject to any forum selection clause with respect to its claims against BNPP France. The trial court properly denied BNPP France’s motion to dismiss based on that clause.

Affirmed.

Judges ROBERT C. HUNTER and CALABRIA concur.

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STATE OF NORTH CAROLINA v. YONY ORELLAN BONILLA

No. COA10-351

(Filed 15 February 2011)

**1. Kidnapping— motion to dismiss—sufficiency of evidence— purpose to terrorize or inflict serious bodily harm—sexual assault**

The trial court did not err by denying defendant's motion to dismiss the charge of kidnapping the surviving victim. The evidence was sufficient to show that defendant's purpose was to terrorize or inflict serious bodily harm. Defendant conceded that in the light most favorable to the State, the purpose of confining and restraining the victim was to sexually assault him.

**2. Kidnapping— motion to dismiss—sufficiency of evidence— purpose to terrorize or inflict serious bodily harm—suffocation—strangulation**

The trial court did not err by denying defendant's motion to dismiss the charge of kidnapping the deceased victim. The evidence was sufficient to show that defendant's purpose was to terrorize or inflict serious bodily harm including suffocation, strangulation, fracture of the spine, and death.

**3. Homicide— first-degree murder—motion to dismiss—sufficiency of evidence—intent to kill**

The trial court did not err by failing to dismiss the charge of first-degree murder. The facts indicated that the manner of death was a result of the intentional acts of beating, suffocating, and binding the victim so tightly that it broke his spine.

**4. Criminal Law— jury instruction—flight—consciousness of guilt**

The trial court did not err by instructing the jury on flight as evidence of consciousness of guilt. The evidence was sufficient to show that defendant fled the scene after commission of the crime and took steps to avoid apprehension.

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**5. Homicide— first-degree murder—predicate felony—first-degree kidnapping**

The trial court did not err by instructing the jury that they could consider, as a predicate felony to murder, that defendant killed during the perpetration of first-degree kidnapping.

**6. Kidnapping— jury instruction—plain error analysis—terrorizing—serious bodily harm**

The trial court did not commit plain error by instructing the jury on the charges of kidnapping. The trial court's instruction appropriately defined "terrorizing" and "serious bodily harm" as required for guilt of the offense of kidnapping under N.C.G.S. § 14-39.

**7. Kidnapping— jury instruction—plain error analysis—terrorizing the victim**

The trial court did not commit plain error by instructing the jury to consider kidnapping for the purpose of terrorizing the victim.

**8. Sexual Offenses— use of dangerous or deadly weapon—bottle**

The trial court did not commit plain error by instructing the jury to consider whether defendant was guilty of a sexual offense based on the use of a bottle as a dangerous or deadly weapon.

**9. Kidnapping— dead victim not released in safe place—waiver of double jeopardy argument**

The trial court did not err by concluding that the first-degree kidnapping offense committed on the deceased victim should not be vacated. Contrary to defendant's argument, a person killed during the course of a kidnapping was not released in a safe place. Further, defendant waived his double jeopardy argument by failing to raise it at trial.

Appeal by defendant from judgments entered 14 December 2009 by Judge R. Allen Baddour, Jr., in Harnett County Superior Court. Heard in the Court of Appeals 29 September 2010.

*Attorney General Roy Cooper, by Special Deputy Attorney General Danielle Marquis Elder, for the State.*

*Parish, Cooke & Condlin, by James R. Parish, for defendant-appellant.*

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BRYANT, Judge.

Where defendant bound and gagged the assault victim, threatened to kill him, and then sexually assaulted him, we uphold the trial court's denial of defendant's motion to dismiss the charge of first-degree kidnapping. Where the evidence established that the murder victim died as a result of strangulation and suffocation, with fracture of the thoracic spine as a contributing factor, and where the evidence established that defendant viciously hit and kicked the murder victim, then carried him into another room, where the murder victim was later found bound by his neck, hands, and feet, we uphold the trial court's denial of defendant's motion to dismiss the charge of first-degree murder.

*Facts*

On the afternoon of 4 February 1997, Jorge Alvarez<sup>1</sup> visited Javier Cortes in his apartment on North King Avenue in Dunn. Cortes shared the apartment with defendant Yony Bonilla and Alfred Gomes. Defendant and Gomes returned to the apartment about 9 p.m. Shortly after they arrived, the three roommates began to argue and fight. Cortes was knocked to the floor, where he was kicked in the stomach repeatedly. Gomes and defendant then carried Cortes into a bedroom. Alvarez pleaded with them to leave Cortes alone. Defendant and Gomes then attacked Alvarez, kicking and hitting him. Alvarez was pushed face down on the ground, his hands tied behind him, his feet bound, and a rag was placed in his mouth. Both defendant and Gomes told him they were going to kill him. They pulled Alvarez's pants and underwear down. Gomes forced a wine bottle into his rectum; after that, defendant and Gomes each had anal intercourse with Alvarez. The attackers eventually left, and, over the course of three-to-four hours, Alvarez was able to free himself, whereupon he discovered Cortes' body. Alvarez fled the apartment and called the police.

At 10:00 a.m., on 5 February 1997, Officer Robert Jenkins, of the Dunn Police Department, was the first to respond to the report of an assault in the apartment on North King Avenue. Upon entering the apartment, Officer Jenkins discovered the body of a Hispanic male in a bedroom "bound with some kind of white cord around his feet and hands." After further investigation, a warrant for defendant's arrest was issued on 5 February 1997. In September 2007, defendant was extradited from Texas on charges of first-degree murder, kidnapping, and first-degree sexual offense.

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1. Pseudonyms have been used to protect the identities of the victims.

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At trial, defendant presented no evidence. A jury found defendant guilty of first-degree murder, two counts of first-degree sexual offense, and two counts of first-degree kidnapping. The trial court entered judgment in accordance with the jury's verdict and sentenced defendant as a level I offender. For first-degree murder, defendant was sentenced to life in prison; for one count of first-degree sexual offense, defendant was sentenced to 240 to 297 months; and for the remaining counts of first-degree sexual offense and first-degree kidnapping, defendant was sentenced to a term of 240 to 297 months in prison. All sentences were to be served consecutively. Defendant appeals.

On appeal, defendant raises the following nine issues: Did the trial court err in (I) failing to dismiss the kidnapping charge as to Alvarez and (II) Cortes; and (III) failing to dismiss the charge of first-degree murder. Did the trial court err in (IV) instructing the jury on flight, (V) first-degree murder, (VI) first-degree kidnapping, (VII) kidnapping for the purpose of terrorizing the victim, and (VIII) committing a sex offense with the use of a dangerous or deadly weapon. Did the trial court err in (IX) failing to vacate the verdict on first-degree kidnapping.

*I*

[1] First, defendant argues that the trial court erred in failing to dismiss the charge of kidnapping Alvarez for insufficiency of the evidence. The kidnapping indictment states that defendant confined and restrained Alvarez "for the purpose of terrorizing him and doing serious bodily harm to him." Defendant contends that the evidence did not indicate his purpose was to terrorize or inflict serious bodily harm. We disagree.

Under North Carolina General Statutes, section 14-39(a), kidnapping is committed where the unlawful confinement, restraint, or removal of a person from one place to another is for the purpose of: "(3) [d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person[.]" N.C. Gen. Stat. § 14-39(a)(3) (2009). "Terrorizing is defined as 'more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension.' " *State v. Davis*, 340 N.C. 1, 24, 455 S.E.2d 627, 639 (1995) (quoting *State v. Moore*, 315 N.C. 738, 745, 340 S.E.2d 401, 405 (1986)).

When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines

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“whether the State presented ‘substantial evidence’ in support of each element of the charged offense.” *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005); *see also State v. McNeil*, 359 N.C. 800, 803-04, 617 S.E.2d 271, 273-74 (2005) (citations omitted); *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004), *cert. denied*, 543 U.S. 1156, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005). “‘Substantial evidence’ is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion.’” *McNeil*, 359 N.C. at 804, 617 S.E.2d at 274 (quoting *Garcia*, 358 N.C. at 412, 597 S.E.2d at 746 (citations omitted)). In this determination, all evidence is considered “in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.” *Id.* (quoting *Garcia*, 358 N.C. at 412-13, 597 S.E.2d at 746 (citation omitted)).

*State v. Abshire*, 363 N.C. 322, 327-28, 677 S.E.2d 444, 449 (2009).

Defendant contends that there is no indication that his purpose was to terrorize. The evidence showed that defendant beat and kicked Alvarez repeatedly while wrestling him to the floor. Defendant bound Alvarez’s hands and feet and placed a rag in his mouth; because of the rag, Alvarez could no longer call for help. Both defendant and Gomes then threatened to kill Alvarez. Defendant pulled Alvarez’s pants and underwear down, and Gomes forced a bottle into his rectum. At trial, Alvarez testified that he thought he was going to die. In the light most favorable to the State, the evidence is sufficient to establish some high degree of fear, intense fright, or apprehension.

Defendant also argues that there was insufficient evidence to establish he kidnapped Alvarez for “the purpose of . . . doing serious bodily harm to him.” However, defendant concedes that “in the light most favorable to the State it appears that the purpose of confining and restraining [Alvarez] was to sexually assault him.” Our Supreme Court has previously upheld the denial of a motion to dismiss a charge of kidnapping for the purpose of doing “serious bodily harm” where the victim suffered from a sexual assault. *State v. Richardson*, 342 N.C. 772, 467 S.E.2d 685 (1996); *State v. Thompson*, 306 N.C. 526, 294 S.E.2d 314 (1982). Therefore, we uphold the trial court’s denial of defendant’s motion to dismiss the charge of kidnapping.

*II*

[2] Next, defendant argues that the trial court erred in failing to dismiss the charge of kidnapping Cortes. Defendant again contends that the

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State failed to establish that defendant kidnapped Cortes “for the purpose of terrorizing him and doing serious bodily harm to him.” We disagree.

The evidence showed that defendant and Gomes knocked Cortes to the floor, where he was kicked in the stomach repeatedly, until defendant and Gomes carried him into a bedroom, where his deceased body was later found. Associate Chief Medical Examiner Dr. Robert L. Thompson examined the body. At trial, Dr. Thompson, was admitted as an expert in forensic pathology. Dr. Thompson’s testimony regarding his observations and examination of the murder victim shows the extent of bodily harm. He noted that there were three “electrical-type” cords around Cortes’ neck. The cords extended down the back and were wrapped around each wrist. “The cords extended down through the lower back area, and there were six . . . cords around each lower leg [in the ankle area]. The legs and hands, legs and arms were behind the back, and the body was tied in a ‘hog-tied’ fashion.” “The feet were pulled up behind the back, toward the neck area, and they were tied in this area. In other words, with the neck being tied, pulled close to the legs area, and the feet and legs pulled up toward the neck area in the back area.” The body exhibited small lacerations to the lips and small abrasions to both the right and left side of the face as well as the neck. There were also abrasions in the chest and abdomen area, which were consistent with injuries inflicted during a struggle. Lacerations to Cortes’ right hand were consistent with defensive wounds. In Cortes’ mouth were two portions of tissue paper. Dr. Thompson performed an internal examination of the body and discovered a fracture in the thoracic spine, caused by severe arching of the back. Due to the fracture, Cortes “would have been paralyzed in the lower part of his body.” Dr. Thompson testified that “[t]he cause of death of Mr. [Cortes] was a combination of suffocation and strangulation, with a contributing factor being the fracture of the thoracic spine.”

We hold that there is ample evidence to support the trial court’s denial of defendant’s motion to dismiss the charge of kidnapping Cortes where there was sufficient evidence to show that defendant’s purpose was to terrorize and do serious bodily harm. Accordingly, defendant’s argument is overruled.

*III*

**[3]** Defendant argues the trial court erred in failing to dismiss the charge of first-degree murder for insufficiency of the evidence.

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Defendant contends that the manner of Cortes' death does not indicate premeditation and deliberation or an intent to kill. We disagree.

"In order to convict a defendant of premeditated, first-degree murder, the State must prove: (1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation." *State v. Peterson*, 361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007) (citing N.C.G.S. § 14-17 (2005)); *see also, State v. Hamby*, 276 N.C. 674, 174 S.E.2d 385 (1970), *judgment vacated in part on other grounds*, 408 U.S. 937, 33 L. Ed. 2d 754 (1972)).

"An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred." *State v. Cauley*, 244 N.C. 701, 708, 94 S.E.2d 915, 921 (1956), *quoted in [State v. Alexander*, 337 N.C. 182, 188, 446 S.E.2d 83, 87 (1994)]. "[T]he nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred." *Alexander*, 337 N.C. at 188, 446 S.E.2d at 87 (quoting *State v. White*, 307 N.C. 42, 49, 296 S.E.2d 267, 271 (1982)). Moreover, an assailant "must be held to intend the natural consequences of his deliberate act." *State v. Jones*, 18 N.C. App. 531, 534, 197 S.E.2d 268, 270, *cert. denied*, 283 N.C. 756, 198 S.E.2d 726 (1973).

*State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000).

Here, after defendant and Gomes beat and kicked him, Cortes was carried into a bedroom, where he was tied with his hands and feet behind his back. His "neck [was] tied, pulled close to the legs area, and the feet and legs pulled up toward the neck area in the back area," and two pieces of tissue were inserted into his mouth. Due to the severe arching of his back, Cortes suffered a fracture in his thoracic spine and ultimately died from "a combination of suffocation and strangulation . . ." These facts, indicating that the manner of death was a result of the intentional acts of beating, suffocating, and binding the victim so tightly as to break his spine, were sufficient to show intent to kill. Defendant's argument is overruled.

**IV**

[4] Defendant argues that the trial court erred in instructing the jury on flight as evidence of consciousness of guilt. Defendant contends

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that there was no evidence he fled the scene, attempted to hide or avoid detection. We disagree.

An instruction on flight “is appropriate where ‘there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime[.]’” *State v. Kornegay*, 149 N.C. App. 390, 397, 562 S.E.2d 541, 546 (2002) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)). “‘The relevant inquiry concerns whether there is evidence that defendant left the scene of the [crime] and took steps to avoid apprehension.’” *Id.* (quoting *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990)). If we find “some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given. . . .” *Irick*, 291 N.C. at 494, 231 S.E.2d at 842 (citation omitted).

*State v. Ethridge*, 168 N.C. App. 359, 362-63, 607 S.E.2d 325, 327-28 (2005).

The evidence presented indicates that, before exiting the apartment, defendant and Gomes left Cortes and Alvarez bound with cords, placed a two-by-four across the inside of the apartment door (hindering access from the outside), and exited the apartment through a window. After taking hours to free himself, Alvarez had to remove the two-by-four in order to exit. Also, despite the fact that defendant lived with Cortes, there was no indication he ever returned to the apartment. Although a warrant for defendant’s arrest was issued immediately, ten years passed before defendant was extradited from Texas in September 2007. We hold that the evidence presented was sufficient to support the jury instruction on flight, since it showed that defendant fled the scene after commission of the crime and took steps to avoid apprehension. Accordingly, defendant’s argument is overruled.

## V

**[5]** Defendant argues that the trial court erred in instructing the jury that they could consider, as a predicate felony to murder, that defendant killed during the perpetration of first-degree kidnapping. Defendant incorporates his arguments under II, *supra*, and further contends that, if there was insufficient evidence to present the issue of kidnapping to the jury, the trial court’s instruction—that the jury consider kidnapping as the predicate felony for first-degree murder

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under the felony-murder rule—was error. However, finding the evidence sufficient to support the charge of kidnapping, we overruled defendant’s argument under II, *supra*. Therefore, this argument is without merit.

**VI**

[6] Defendant argues that the trial court committed plain error in instructing the jury on the charges of kidnapping. Specifically, defendant contends that the trial court blended the pattern jury instructions for first-degree kidnapping under N.C.P.I.—Crim. 210.20 and N.C.P.I.—Crim. 210.25 and, thus, failed to instruct the jury on the essential elements of the offense. We disagree.

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.

*State v. Cummings*, 361 N.C. 438, 470, 648 S.E.2d 788, 807 (2007) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

“Failure to follow the pattern instructions does not automatically result in error. ‘In giving instructions the court is not required to follow any particular form,’ as long as the instruction adequately explains each essential element of an offense.” *State v. Bunch*, 363 N.C. 841, 846, 689 S.E.2d 866, 870 (2010) (quoting *State v. Avery*, 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985)).

Under North Carolina General Statutes, section 14-39, the offense of kidnapping is committed when “[a]ny person . . . unlawfully confine[s], restrain[s], or remove[s] from one place to another, any other person[,] . . . if such confinement, restraint or removal is for the purpose of . . . (3) [d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed . . . .” N.C.G.S. § 14-39(a) (2009).

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Defendant specifically challenges the trial court's instruction regarding the elements of "terrorizing" and "serious bodily harm." In its instruction, the trial court stated the following:

Terrorizing means more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension, or doing serious bodily injury to that person. Serious bodily injury may be defined as such physical injury as causes great pain or suffering.

The trial court's instruction clearly and appropriately defined "terrorizing" and "serious bodily harm" as required for guilt of the offense of kidnapping under N.C.G.S. § 14-39. Defendant's argument is overruled.

## VII

[7] Defendant argues that the trial court committed plain error in instructing the jury to consider kidnapping for the purpose of terrorizing the victim; however, for the reasons stated here in sections I and II, *supra*, we overrule defendant's argument.

## VIII

[8] Defendant argues that the trial court committed plain error in instructing the jury to consider whether defendant was guilty of a sexual offense with the use of a dangerous or deadly weapon. Defendant contends that the State presented no evidence of a deadly weapon and that, because the jury did not specify the ground by which it found defendant guilty of the sexual offense, his conviction should be set aside. We disagree.

Under North Carolina General Statutes, section 14-27.4,

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

...

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon . . . .

N.C. Gen. Stat. § 14-27.4(a) (2009).

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An instrument which is likely to produce death or great bodily harm under the circumstances of its use is properly denominated a deadly weapon. *State v. Cauley*, 244 N.C. 701, 94 S.E.2d 915 (1956); *State v. Perry*, 226 N.C. 530, 39 S.E.2d 460 (1946). But where the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce such results, its allegedly deadly character is one of fact to be determined by the jury. *State v. Perry, supra*; *State v. Watkins*, 200 N.C. 692, 158 S.E. 393 (1931).

*State v. Joyner*, 295 N.C. 55, 64-65, 243 S.E.2d 367, 373 (1978). In *Joyner*, the victim was attacked and held down by the defendant while an accomplice forcibly inserted a Pepsi-Cola bottle into her rectum. *Id.* at 65, 243 S.E.2d at 374. Our Supreme Court reasoned that, “[s]ince the bottle used [was] an instrument which, depending on its use, may or may not be likely to produce great bodily harm, the trial judge properly submitted the question regarding its deadly character to the jury.” *Id.*

Here, Alvarez testified that defendant and Gomes, after tying his hands and feet, shoved a rag into his mouth, pulled his pants and underwear down, and inserted a bottle into his rectum. “I thought that it would probably be left inside, or that I was going to die or something.” Later, an emergency room nurse examined Alvarez and observed a tear in his anal wall accompanied by “serious drainage.” The trial court did not err in instructing the jury that it could consider whether or not the use of the bottle constituted a deadly weapon during the commission of the sexual offense. Defendant’s argument is overruled.

*IX*

[9] Last, defendant argues that the conviction for the first-degree kidnapping of Cortes should be vacated. Defendant contends that the evidence does not support a finding Cortes was not left in a safe place and that a conviction premised upon inflicting serious injury would violate the prohibition of double jeopardy. We do not agree with defendant’s contention and overrule the second argument.

“If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree . . . .” N.C.G.S. § 14-39(b). Defendant contends that, because Cortes died, the issue of whether defendant left Cortes in a safe place is irrelevant. However, our Supreme Court has held that “unquestionably, [a] person who is killed

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during the course of a kidnapping is not released in a safe place.” *State v. Roache*, 358 N.C. 243, 308, 595 S.E.2d 381, 422-23 (2004). Alternatively, the record evidence indicates that Cortes was alive when defendant carried him into the bedroom. To suggest that leaving a person bound by his neck, hands, and feet so tightly that he suffers a fracture to his spine and ultimately suffocates amounts to being left in a position of safety, is an argument without merit.

As to the second portion of defendant’s argument, the record does not indicate that defendant raised the double jeopardy argument before the trial court; therefore, we do not address it for the first time here. *See State v. Raines*, 362 N.C. 1, 18, 653 S.E.2d 126, 137 (2007) (affirming the defendant’s two capital sentences and not considering the merits of his constitutional arguments raised for the first time on appeal).

No error.

Judges STEELMAN and ERVIN concur.

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RODNEY EUGENE DAVIS, PLAINTIFF v. ELBERT A. RUDISILL, JR., KATHY MARGARET RUDISILL (FORMERLY KATHY MARGARET RICHARDSON), SOUTH PARK MEDICAL CLINIC, P.A., AND RUDISILL FAMILY PRACTICE, P.A., DEFENDANTS

No. COA10-687

(Filed 15 February 2011)

**1. Pleadings— answer—leave to amend granted—no abuse of discretion**

The trial court did not abuse its discretion in a medical malpractice case by allowing defendants to amend their answer during trial. There was no undue delay in the amendment simply because the amendment took place during trial and, given the evidence presented during discovery and then at trial, plaintiff could not show prejudice.

**2. Evidence— public file—motion in limine—admission unduly prejudicial—no abuse of discretion**

The trial court did not abuse its discretion in a medical malpractice case by granting defendants’ motion *in limine* precluding

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the admission of Dr. Rudisill's North Carolina State Medical Board public file. The evidence was unduly prejudicial and could have potentially misled the jury pursuant to N.C.G.S. § 8C-1, Rule 403.

**3. Medical Malpractice— motion for new trial denied—costs awarded defendant—no abuse of discretion**

The trial court did not abuse its discretion in a medical malpractice case by denying plaintiff's motion for a new trial filed pursuant to N.C.G.S. § 1A-1, Rule 59 and subsequently awarding costs to defendant.

Appeal by plaintiff from judgment entered 5 June 2009 and orders entered 4 September 2009 by Judge Kevin M. Bridges in Catawba County Superior Court. Heard in the Court of Appeals 1 December 2010.

*Grant Richman PLLC, by Robert M. Grant, Jr., for plaintiff-appellant.*

*Shumaker, Loop & Kendrick, LLP, by Scott M. Stevenson, Karen H. Stiles, and Scott A. Hefner, for defendants-appellees.*

HUNTER, Robert C., Judge.

Rodney Eugene Davis ("plaintiff") appeals from a judgment entered 5 June 2009 after a jury found the defendants Dr. Elbert A. Rudisill ("Dr. Rudisill"), Kathy Margaret Rudisill ("Mrs. Rudisill"), South Park Medical Clinic, P.A. ("South Park"), and Rudisill Family Practice, P.A. (collectively, "defendants") not liable for plaintiff's injuries in a medical malpractice action. Plaintiff also appeals from the trial court's 4 September 2009 orders denying his motion for a new trial and awarding costs to defendants. After careful review, we affirm.

Background

On 28 February 2004, plaintiff was transported by ambulance to the emergency room at Grace Hospital. It was determined that plaintiff was suffering from atrial fibrillation, heart attack, and stroke. Plaintiff's wife, Terri Pearson ("Mrs. Pearson"), informed the emergency room physician that plaintiff had been feeling weak for approximately one week and had some chest pain and a cough. On 23 February 2004,

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plaintiff was seen by his family physician, Dr. Rudisill, at South Park. It is undisputed that Plaintiff was examined by nurse Gail Watson (“Ms. Watson”), who reported that plaintiff had a pulse rate of 142 beats per minute. Plaintiff claimed in his complaint and at trial that he was sent home and told to return for blood work at a later date. Defendants claimed in their answer and at trial that a cardiac evaluation was performed and plaintiff was told to go to the emergency room, but he declined to do so. Ms. Watson wrote in the 23 February 2004 office note: “pt. non-compliant.”

Plaintiff alleged in his complaint that on 25 February 2004, he returned to South Park to have his blood drawn, but was told that he had been fasting too long. He returned the following day, 26 February 2004, and his blood was drawn at that time. Defendants stated in their answer that plaintiff had, in fact, come to South Park on 25 February 2004, but that he had not followed the instructions given to him, therefore his blood could not be drawn. Subsequent evidence revealed that South Park was closed on 25 February 2004 and the trial court allowed defendants to amend their answer during trial to reflect that fact.

On 26 June 2007, plaintiff filed a complaint against defendants alleging that his “atrial fibrillation, heart attack, and stroke . . . was a direct and proximate result of the medical negligence of the Defendants . . .” Plaintiff claimed that his medical history of morbid obesity, high blood pressure, diabetes, and high cholesterol, coupled with his high pulse rate and complaints of weakness and chest pain “should have placed Defendants and their employees on notice that Plaintiff was at risk for death or other catastrophic event . . .” The jury in this case found that the defendants were not liable for plaintiff’s injuries. The trial court entered judgment in favor of defendants, denied plaintiff’s motion for a new trial, and subsequently granted defendants’ motion for costs. Plaintiff timely appealed to this Court.

Discussion

## I.

**[1]** First, plaintiff argues that the trial court erred in allowing defendants to amend their answer during trial. We disagree.

“In situations where a party has no right to amend because of the time limitations in Rule 15(a) [of the North Carolina Rules of Civil Procedure], an amendment may nevertheless be made by leave of court or by written consent of the adverse party.” *Isenhour v.*

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*Universal Underwriters Ins. Co.*, 345 N.C. 151, 154, 478 S.E.2d 197, 199 (1996); N.C. Gen. Stat. § 1A-1, Rule 15(a) (2009). “[L]eave shall be freely given when justice so requires.” N.C. Gen. Stat. § 1A-1, Rule 15(a). “A motion to amend is addressed to the [sound] discretion of the trial court. Its decision will not be disturbed on appeal absent a showing of abuse of discretion.” *Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984). “An abuse of discretion occurs when the trial court’s ruling ‘is so arbitrary that it could not have been the result of a reasoned decision.’” *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 84 (1998).

“Although the spirit of the North Carolina Rules of Civil Procedure is to permit parties to proceed on the merits without the strict and technical pleadings rules of the past, the rules still provide some protection for parties who may be prejudiced by liberal amendment.” *Isenhour*, 345 N.C. at 154-55, 478 S.E.2d at 199. “Among proper reasons for denying a motion to amend are undue delay by the moving party and unfair prejudice to the nonmoving party.” *News & Observer Publishing Co. v. Poole*, 330 N.C. 465, 485, 412 S.E.2d 7, 19 (1992). “The objecting party has the burden of satisfying the trial court that he would be prejudiced by the granting or denial of a motion to amend.” *Watson v. Watson*, 49 N.C. App. 58, 60, 270 S.E.2d 542, 544 (1980).

In the present case, defendants’ answer stated that plaintiff came to South Park on Wednesday 25 February 2004 to have his blood drawn, but that plaintiff “had not followed simple instructions which were necessary to ascertain accurate lab results . . . .” Plaintiff was, therefore, told to come back the following day. However, during discovery, Mrs. Rudisill testified in her deposition that South Park was closed on Wednesdays and open on Saturdays. Plaintiff’s medical records show that a notation was made that plaintiff’s wife called on “27 February 2004” to report that plaintiff was being taken to the emergency room; however, it is undisputed that plaintiff went to the hospital on Saturday, 28 February 2004. Defendants contended that the date on the report was a clerical error and that the call was, in fact, received on Saturday, 28 February 2004. Mrs. Rudisill testified that she was working that day.

At trial, plaintiff sought to read to the jury that portion of defendants’ answer which stated that South Park was open on Wednesday 25

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February 2004. Plaintiff claimed that this statement in the answer constituted a judicial admission and requested a jury instruction to the effect that judicial admissions are “binding in every sense, preventing the party who agreed to the stipulation from introducing evidence to dispute it and relieving the other party of a necessity of producing evidence to establish the admitted fact.” Defendants argued before the trial court that the content of their answer was not a judicial admission and evidence could be offered to explain why the answer originally stated that South Park was open on 25 February 2004. Defendants then made an oral motion to amend their answer pursuant to Rule 15(a). After hearing extensive arguments from counsel, the trial court stated:

[T]he plaintiff has been aware of the defendants’ contention for quite some time that the doctor’s office was in fact open on Saturday and closed on Wednesday, which is inconsistent with the admission. Rule 15 does allow for amendments to be liberally and freely given when justice so requires.

At this point I believe that the motion to amend should be granted and that the defendant should be allowed to amend their answer. And it appears that there is no material prejudice to the plaintiff because they were aware of the defendants’ contention for quite some time, notwithstanding the admission in their answer.

Defendants amended their answer to state: “It is denied that Plaintiff presented to the employees of the Defendants at the offices of South Park Medical Clinic, P.A. on February 25, 2004, as the office was closed on that day.” The trial court did, however, allow plaintiff to read to the jury the original statement in the answer and instructed the jury that the statement constituted an “evidentiary admission [that] is not conclusive but may be controverted or explained . . .”

First, plaintiff contends that there was undue delay on the part of defendants in requesting the amendment during trial. Aside from defendants’ original answer, all of their evidence produced during discovery indicated that South Park was open on Saturday and closed on Wednesday. Defendants did not seek to amend their answer until plaintiff attempted to use their admission as binding at trial despite defendants’ consistent position that the office was open on Saturday when Mrs. Davis called. We see no undue delay in the amendment simply because the amendment took place during trial. *See generally Watson v. White*, 309 N.C. 498, 510, 308 S.E.2d 268, 275 (1983) (stat-

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ing that the trial court acted in its discretion when it allowed defendants to amend their answer after closing arguments at trial which “had the effect of removing the admitted allegations from the class of judicial admissions into the class of evidential admissions”); *Warren v. General Motors Corp.*, 142 N.C. App. 316, 319, 542 S.E.2d 317, 318-19 (2002) (finding no abuse of discretion where the trial court allowed the defendants to amend their respective answers on the first day of trial).

Plaintiff further contends that he was prejudiced by the trial court’s decision to allow defendants to amend their answer. Plaintiff states in his brief that his

trial strategy . . . was that if it is an established fact that [plaintiff] presented and was turned away on Wednesday, 25 February, then the South Park Medical Clinic office was closed on Saturday 28 February; therefore the “Saturday” chart entries . . . of Gail Watson and Kathy Rudisill were false as was their testimony about the Saturday phone call from Plaintiff and their making of the chart entries on Saturday 28 February.

All of the medical experts in this case testified that the standard of care was met if defendants performed a cardiac evaluation and instructed plaintiff to seek emergency room care. Plaintiff claimed that this was not done and defendants claimed that it was. Consequently, the primary issue was one of credibility and plaintiff sought to impeach defendants’ credibility by establishing that South Park was not open on Saturday, and, therefore, the medical records supposedly entered on Saturday were falsified. Again, aside from defendants’ original answer, the evidence indicated that South Park was indeed open on Saturday and closed on Wednesday. There was no evidence that medical records were falsified. We agree with the trial court that plaintiff cannot show prejudice given the evidence presented during discovery and then at trial that South Park was open on Saturday and closed on Wednesday. Plaintiffs were allowed to present to the jury the inconsistency in defendants’ original answer. While plaintiff’s trial strategy may have been hampered by the amendment, we see no abuse of discretion in the trial court’s decision to allow defendants to amend their answer.

## II.

**[2]** Next, plaintiff argues that the trial court erred in granting defendants’ motion *in limine* precluding the admission of Dr. Rudisill’s North Carolina State Medical Board (“Medical Board”) public file. A

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trial court's order granting or denying a motion *in limine* is reviewed for an abuse of discretion. *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 619, 504 S.E.2d 102, 105 (1998).

Defendants in this case filed a motion *in limine* on 4 May 2009 asking the trial court to exclude any reference to Dr. Rudisill's Medical Board public file. The file shows that in 1985, the Medical Board determined that Dr. Rudisill prescribed patients controlled substances when there was no medical need to do so. In 1992, the Medical Board found that Dr. Rudisill had falsified patient records for the purpose of improperly prescribing controlled substances in exchange for cash payments. In 1997, the Medical Board determined that Dr. Rudisill had been selling drug samples to a pharmacist from 1992 to 1995. Defendants argued in their motion:

It is anticipated Plaintiff will attempt to use, and introduce evidence of, Dr. Rudisill, Jr.'s prior 1985 and 1992 Board findings at trial in order to establish that Dr. Rudisill tampered with, altered, fabricated or falsified the medical record of Mr. Davis in 2004. In other words, it is anticipated that they intend to use prior "crimes, wrongs or acts" to show that Defendants acting "in conformity therewith" some 19 and 12 years later. There is absolutely no evidence whatsoever in this case that the Defendants tampered with or falsified entries in Mr. Davis' medical chart. Regardless, evidence of prior wrongs to show conformity therewith in the present case is inadmissible under Evidence Rule 404.

Defendants further claimed that allowing plaintiff to introduce the public file would substantially prejudice defendants. After hearing arguments from counsel, the trial court stated:

I think that because of the time frame of the prior bad acts contained within the North Carolina State Medical Board public file, it's so far removed and so remote that if I were to allow this evidence in, that the danger of unfair prejudice would greatly or substantially outweigh any probative value. I think that once the jury heard it, heard these prior bad acts which happened many years ago prior to the plaintiff ever receiving care there, that they would focus on that and give it undue attention and that any verdict that they reached conceivably would be on an improper basis and not based on the evidence brought out in this case with respect to the current allegations.

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So because of these reasons, the Court with respect to the defendants' motion to preclude the use or admission into evidence of the North Carolina State Medical Board public file, the motion in limine is granted.

In other words, the trial court held that the evidence was unduly prejudicial and could potentially mislead the jury pursuant to N.C. Gen. Stat. § 8C-1, Rule 403 (2009), which states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ."

In his brief, plaintiff argues multiple reasons why this evidence was probative, including to show a common plan or scheme to falsify medical records and to reveal the bias of Ms. Watson who testified on behalf of Dr. Rudisill before the Medical Board. Assuming that this evidence was probative for the reasons argued by plaintiff, we limit our review to determining whether the evidence was unduly prejudicial under Rule 403, as the trial court determined. *Gray v. Allen*, 197 N.C. App. 349, 356, 677 S.E.2d 862, 867 (2009) ("Even taking plaintiff's argument as true—and thus that the evidence was admissible under Rule 404(b)—it is still within the trial court's discretion to make a ruling on admissibility based on the prejudicial effect of the evidence relative to its probative value."). We agree with the trial court's reasoning and find no abuse of discretion in the granting of defendants' motion *in limine*.

Defendants in this case claimed that they followed the standard of care by performing a cardiac evaluation and urged plaintiff to go to the hospital. Plaintiff claimed that defendants did not urge him to go to the hospital; rather, they told him to go home and come back for blood tests. Consequently, this case hinged almost entirely on witness credibility. The only documented evidence concerning defendants' actions was Ms. Watson's note, "pt. noncompliant," which she testified was in reference to plaintiff's refusal to go to the hospital. Plaintiff has admitted in his brief that part of his trial strategy was to cast doubt on the authenticity of this note. While the Medical Board found in 1992, 12 years before plaintiff's stroke, that Dr. Rudisill falsified medical records, there was no evidence in the present case that would indicate that the 23 February 2004 medical record notation was falsified by Dr. Rudisill, Ms. Watson, or any South Park staff member. Evidence that Dr. Rudisill falsified medical records in the past, for reasons completely unrelated to the issue in the present

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case, could mislead the jury into giving undue weight to plaintiff's allegations and result in a verdict based on an improper basis, as the trial court determined. *See Holiday v. Cutchin*, 311 N.C. 277, 279, 316 S.E.2d 55, 57 (1984) (Generally, “[t]he character of a defendant physician in a medical malpractice action is irrelevant to the ultimate issue of whether the physician acted negligently. Such evidence tempts the jury to base its decision on emotion and to reward good people or punish bad people, rather than to render a verdict based upon the facts before them. The use of character evidence by a party to a civil action ‘might move the jury to follow the principles of poetic justice rather than rules of law.’ ” (quoting *Creech v. Creech*, 222 N.C. 656, 664, 24 S.E.2d 642, 648 (1943))).

## III.

[3] Plaintiff argues that the trial court erred in denying his motion for a new trial filed pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 (2009) and subsequently awarding costs to defendant.<sup>1</sup> The standard of review as to both issues is abuse of discretion. *Kor Xiong v. Marks*, 193 N.C. App. 644, 654, 668 S.E.2d 594, 601 (2008); *Vaden v. Dombrowski*, 187 N.C. App. 433, 437, 653 S.E.2d 543, 545-46 (2007). Since we have found no error in the trial court's decision to allow defendants to amend their answer or in the trial court's granting of defendants' motion *in limine*, we hold that the trial court did not err in denying plaintiff's motion for a new trial or in granting costs to defendants pursuant to N.C. Gen. Stat. § 6-20 (2009) and N.C. Gen. Stat. § 7A-305(d) (2009).

Affirmed.

Judges CALABRIA and ELMORE concur.

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1. Plaintiff appealed from entry of these orders.

## IN RE A.W.

[209 N.C. App. 596 (2011)]

IN THE MATTER OF: A.W.

No. COA10-713

(Filed 15 February 2011)

**1. Appeal and Error—preservation of issues—juvenile adjudications—sufficiency of evidence**

Respondent juvenile failed to preserve for appellate review his argument that the State presented insufficient evidence to sustain adjudications that the juvenile was delinquent for having committed second-degree sexual assault and indecent liberties between children. However, the Court of Appeals chose to exercise its authority under N.C. R. App. P. 2 to review respondent juvenile's arguments.

**2. Juveniles—delinquency—second-degree sexual assault—insufficient evidence**

The trial court erred in adjudicating respondent juvenile delinquent for having committed second-degree sexual assault because the State presented no evidence that the victim had any mental limitations that would satisfy the statutory definitions of ‘mentally disabled’ or ‘mentally incapacitated,’ ” as defined in N.C.G.S. § 14-27.1(1) and (2), or that he was physically helpless, as defined in N.C.G.S. § 14-27.1(3).

**3. Juveniles—delinquency—indecent liberties between children—sufficient evidence**

The trial court did not err in adjudicating respondent-juvenile delinquent for having committed indecent liberties between children because the State presented substantial evidence of all the essential elements of the crime, including that the juvenile acted with a purpose to arouse or gratify his sexual desires in committing the act alleged.

**4. Juveniles—delinquency petition—variance of date of offense—no prejudice**

Respondent juvenile's argument that the petition for indecent liberties between children should have been dismissed because there was a discrepancy between the date upon which the offense was alleged to have occurred and that shown by the evidence was overruled. The juvenile made no showing as to how his ability to present an adequate defense was prejudiced by the variance.

## IN RE A.W.

[209 N.C. App. 596 (2011)]

**5. Juveniles— delinquency proceeding—counsel denied opportunity to make closing argument—adjudication vacated**

The trial court erred by making the determination to adjudicate the juvenile respondent delinquent for having committed the charged offenses without giving his counsel the opportunity to make a closing argument. The adjudication that the juvenile was delinquent for having committed the misdemeanor offense of indecent liberties between children was vacated.

Appeal by respondent-juvenile from order entered 28 August 2009 by Judge Louis F. Foy, Jr. and order entered 11 December 2009 by Judge James L. Moore, Jr. in Onslow County District Court. Heard in the Court of Appeals 15 November 2010.

*Attorney General Roy Cooper, by Assistant Attorney General LaToya B. Powell, for the State.*

*Kimberly P. Hoppin for respondent-juvenile.*

*MARTIN, Chief Judge.*

In February 2009, respondent-juvenile was charged in juvenile petitions with being delinquent by reason of having committed a misdemeanor assault, having taken indecent liberties with a child at least three years younger than respondent-juvenile in violation of N.C.G.S. § 14-202.2, and having committed a second-degree sexual offense in violation of N.C.G.S. § 14-27.5(a)(2). Respondent-juvenile denied the allegations in the petitions, and an adjudication hearing was conducted on 27 August 2009.

Briefly summarized, the evidence at the adjudication hearing tended to show that respondent-juvenile lived with his mother and sister. His mother also had two younger children, a son and a daughter, who lived with their father, respondent-juvenile's step-father, but visited with respondent-juvenile's mother every other weekend. In November 2008, when respondent-juvenile was thirteen years of age and his half-brother and half-sister were four- and six-years old respectively, the younger children came to the home for visitation. During the visitation, respondent-juvenile told his younger half-brother that respondent-juvenile's testicles and penis "taste like candy," and that the child should lick them. The child did so in the presence of his sister. Respondent-juvenile testified in his own defense, denying any inappropriate conduct with his younger half-brother and half-sister.

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At the conclusion of the hearing, the State acknowledged that it had not proceeded on the misdemeanor assault charge, and the court dismissed that charge. The court found that respondent-juvenile had committed the felony offense of second-degree sexual offense and the misdemeanor offense of indecent liberties between children, and adjudicated respondent-juvenile to be delinquent. The disposition hearing was continued to a later date.

On 31 August 2009, a juvenile petition was filed alleging that respondent-juvenile was delinquent by reason of having committed felonious breaking or entering, felonious larceny, and felonious possession of stolen property, offenses unrelated to the offenses for which he had earlier been adjudicated delinquent. On 10 December 2009, respondent-juvenile admitted to the charge of felonious breaking or entering in exchange for dismissal of the charges of felonious larceny and felonious possession of stolen property. The court consolidated the offenses for disposition pursuant to N.C.G.S. § 7B-2508(h) and entered a Level 3 Disposition and Commitment Order based upon the second-degree sexual offense, the most serious of the offenses for which respondent-juvenile was adjudicated delinquent. Respondent-juvenile gave notice of appeal.

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[1] Respondent-juvenile first contends the State presented insufficient evidence to sustain the adjudications that he committed second-degree sexual assault and indecent liberties between children. As is the case in adult criminal prosecutions, however, a juvenile charged in a petition with being delinquent is precluded from challenging the sufficiency of the evidence on appeal unless he has moved to dismiss the petition at the close of all the evidence. *In re Hartsock*, 158 N.C. App. 287, 291, 580 S.E.2d 395, 398 (2003); N.C.R. App. P. 10(a)(3). In the present case, respondent-juvenile's counsel did not move to dismiss either of the petitions at the close of the evidence, precluding respondent-juvenile from challenging the sufficiency of the evidence on appeal. Respondent-juvenile acknowledges that he has waived review of these issues; however, he contends that his counsel's failure to move to dismiss the petitions at the close of all the evidence amounted to a violation of his right to the effective assistance of counsel. In the alternative, he requests that this Court review these issues pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure.

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N.C.R. App. P. 2 permits an appellate court to “suspend or vary the requirements or provisions” of the rules of appellate procedure to prevent “manifest injustice.” “[T]his residual power to vary the default provisions of the appellate procedure rules should only be invoked rarely and in ‘exceptional circumstances,’ *State v. Gayton-Barbosa*, 197 N.C. App. 129, 134, 676 S.E.2d 586, 589 (2009) (quoting *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007)), but our Courts “have regularly invoked N.C.R. App. P. 2 in order to address challenges to the sufficiency of the evidence to support a conviction.” *Id.* at 134, 676 S.E.2d at 590 (citing *State v. Booher*, 305 N.C. 554, 564, 290 S.E.2d 561, 566 (1982) (“Nevertheless, when this Court firmly concludes, as it has here, that the evidence is insufficient to sustain a criminal conviction, even on a legal theory different from that argued, it will not hesitate to reverse the conviction, *sua sponte*, in order to prevent manifest injustice to a party.” (internal quotation marks omitted))). In the present case, we choose to exercise our authority under N.C.R. App. P. 2 to review respondent-juvenile’s arguments.

[2] To withstand a motion to dismiss charges contained in a juvenile petition, the State must present substantial evidence of each of the material elements of the offense charged and that respondent-juvenile was the perpetrator. *In re Bass*, 77 N.C. App. 110, 115, 334 S.E.2d 779, 782 (1985). The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference of fact that may be drawn from the evidence. *Id.*

N.C.G.S. § 14-27.5 provides,

(a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:

- (1) By force and against the will of the other person; or
- (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.

N.C. Gen. Stat. § 14-27.5 (2009). The petition in this case alleges that respondent-juvenile engaged in a sexual act, “namely having victim lick his penis and testicles with [victim] who was mentally disabled, mentally incapacitated, or physically helpless, and the delinquent juvenile who performed the act knew or should reasonably have known that the victim was mentally disabled, mentally incapacitated,

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or physically helpless." The State concedes there was no evidence that the victim "had any mental limitations that would satisfy the statutory definitions of 'mentally disabled' or 'mentally incapacitated,'" as those terms are defined by N.C.G.S. § 14-27.1(1) and (2), or that he was "physically helpless," as that term is defined in N.C.G.S. § 14-27.1(3). *See generally* N.C. Gen. Stat. § 14-27.1(1)-(3) (2009) (defining "mentally disabled," "mentally incapacitated," and "physically helpless," as those terms are used in N.C.G.S. § 14-27.5). Thus, the State concedes, and we agree, that the evidence was insufficient to prove the elements of second-degree sexual offense. Accordingly, we must vacate the adjudication that respondent-juvenile is delinquent for having committed a second-degree sexual offense.

[3] As to the adjudication that respondent-juvenile is delinquent for having committed the misdemeanor offense of indecent liberties between children, however, the State makes no such concession with regard to the sufficiency of the evidence. The juvenile petition charged respondent-juvenile with violating N.C.G.S. § 14-202.2(a)(1). The elements of that offense are that (1) the respondent-juvenile, (2) being under the age of sixteen years, (3) took or attempted to take indecent liberties, (4) with a child who is at least three years younger than the respondent-juvenile, (5) for the purpose of arousing or gratifying sexual desire. N.C. Gen. Stat. § 14-202.2(a)(1) (2009). Respondent-juvenile argues that there was insufficient evidence to show that he acted with a purpose to arouse or gratify his sexual desires in committing the act alleged in the petition.

This Court has held that "the purpose of arousing or gratifying sexual desire" required by the statute cannot be inferred solely from the act itself and that, absent a showing of the alleged delinquent juvenile's sexual intent in committing the act, there can be no violation of N.C.G.S. § 14-202.2. *In re T.S.*, 133 N.C. App. 272, 277, 515 S.E.2d 230, 233, *disc. review denied*, 351 N.C. 105, 540 S.E.2d 751 (1999). The sexual purpose necessary to satisfy the element of a "purpose to arouse or gratify sexual desires" required by N.C.G.S. § 14-202.2 may be shown by "evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting[.]" *In re T.C.S.*, 148 N.C. App. 297, 302, 558 S.E.2d 251, 254 (2002) (internal quotation marks omitted).

In the present case, the juvenile respondent was thirteen-years old while the victim was but three-years old. In the presence of the victim's six-year-old sister, respondent-juvenile told the victim that

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respondent-juvenile's private parts "taste like candy," whereupon he had the victim lick his penis. There was also evidence which showed that, while respondent-juvenile was living with his biological father in another state approximately eleven months prior to the events giving rise to this proceeding, he admitted to an investigator that he had performed fellatio on his four-year-old brother there. Though respondent-juvenile denied the act and testified that he had admitted it only after having been instructed to do so by his father, an inference may be drawn therefrom that respondent-juvenile was sexually aware and had the intent to perform sexual acts with very young, male victims. Thus, we believe the evidence of respondent's age and maturity as well as the age disparity between him and the victim in this case, coupled with the inducement he employed to convince the victim to perform the act and the suggestion of his prior sexual activity some months before this event, was "sufficient evidence of maturity and intent to show the required element of 'for the purpose of arousing or gratifying sexual desire.' " *Id.* at 303, 558 S.E.2d at 254.

[4] Respondent-juvenile also contends the petition for indecent liberties between children should have been dismissed because there was a discrepancy between the date upon which the offense was alleged to have occurred, 14 November 2008, and that shown by the evidence, the weekend of 7-9 November 2008. As a general rule, the date upon which a crime is alleged by the bill of indictment to have occurred is not an element of the offense, and that the evidence shows the crime occurred on another date is not a ground for dismissal, particularly where the variance is slight, no statute of limitations is involved, and the variance does not affect the ability of the defendant to present an adequate defense. *State v. McGriff*, 151 N.C. App. 631, 637, 566 S.E.2d 776, 780 (2002). Respondent-juvenile in this case has made no showing as to how his ability to present an adequate defense was prejudiced by the variance, and we hold the variance did not require a dismissal of the charge.

[5] Finally, respondent-juvenile argues that he is entitled to a new adjudicatory hearing on the charge of indecent liberties between children because the trial court denied his counsel the opportunity to make a closing argument. His contention arises from the following exchange, which occurred immediately after his counsel concluded her examination of respondent-juvenile, the final witness called at the adjudicatory hearing:

[Defense Counsel]: That's all I have.

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[Prosecutor]: Nothing further, Judge.

COURT: You may step down.

[Defense Counsel]: That's all we have, Your Honor.

COURT: You may step down. All right, I do, I do find that the juvenile is delinquent and uh, in that he committed a second degree sexual offense which is a Class C Felony in violation of North Carolina General Statute 14-27.5 and further that he did commit delinquent—further that he committed indecent liberties between children in violation of North Carolina General Statute 14-202.2. Uh, I'll hear arguments as to the misdemeanor assault.

[Prosecutor]: Judge, we, he's not charged with misdemeanor assault in our proceeding today. It may be listed on there but we didn't proceed on that charge.

COURT: All right, uh, the Court dismisses that charge, I understand the State's not proceeding on that.

[Prosecutor]: Yes sir.

COURT: All right, as to disposition?

[Defense Counsel]: Your Honor, we would ask that uh, we were prepared to uh, give a closing argument, Your Honor, but—

COURT: Uh, [Counsel], I've already, I've already adjudicated him to be delinquent.

We remind our colleagues who perform the difficult task of determining whether juveniles are undisciplined or delinquent, and, if so, the appropriate disposition, treatment, and services that will protect the public while providing accountability and rehabilitation for the juvenile offender's actions, that at the adjudicatory stage, the juvenile is entitled to all of the rights specified in N.C.G.S. § 7B-2405, which include all rights afforded adults accused of crimes, except the right to bail, the right of self-representation, and the right of trial by jury. N.C. Gen. Stat. § 7B-2405(6) (2009). The statute recognizes that, while juvenile delinquency proceedings are not criminal trials, they are conducted as adversarial proceedings and are sufficiently similar in nature that they must be conducted so as to afford the accused juvenile due process.

The United States Supreme Court has held,

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There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. Accordingly, it has universally been held that counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge. The issue has been considered less often in the context of a so-called bench trial. But the overwhelming weight of authority, in both federal and state courts, holds that *a total denial of the opportunity for final argument in a nonjury criminal trial is a denial of the basic right of the accused to make his defense.*

*Herring v. New York*, 422 U.S. 853, 858-59, 45 L. Ed. 2d 593, 598 (1975) (emphasis added). The Court explained:

Some cases may appear to the trial judge to be simple—open and shut—at the close of the evidence. And surely in many such cases a closing argument will, in the words of Mr. Justice Jackson, be “likely to leave [a] judge just where it found him.” But just as surely, there will be cases where closing argument may correct a premature misjudgement and avoid an otherwise erroneous verdict. And there is no certain way for a trial judge to identify accurately which cases these will be, until the judge has heard the closing summation of counsel.

*Id.* at 863, 45 L. Ed. 2d at 601 (alteration in original). In *Herring*, the Court held that the denial of the defendant’s right to present a closing argument was a denial of the right to the assistance of counsel, and that the denial of the right to present a closing argument may constitute a denial of the right to present a defense. *Id.* at 859, 865, 45 L. Ed. 2d at 598, 602; *State v. Miller*, 344 N.C. 658, 673, 477 S.E.2d 915, 924 (1996).

In this case, the trial judge made the determination to adjudicate the juvenile-respondent delinquent for having committed the charged offenses without giving his counsel the opportunity to make a closing argument—indeed, without inquiring as to whether she desired to do so. Therefore, we must vacate the adjudication that he is delinquent for having committed the misdemeanor offense of indecent liberties between children and remand this case to the trial court for further proceedings consistent with this opinion.

For the foregoing reasons, the juvenile order entered 28 August 2009 adjudicating respondent-juvenile delinquent for having committed

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the felony of second-degree sexual offense and for having committed the misdemeanor of indecent liberties between children is vacated. The juvenile disposition and commitment order entered 11 December 2009 is also vacated. This case is remanded for dismissal of the charge of second-degree sexual offense, a new adjudication hearing on the charge of indecent liberties between children, and a new disposition hearing upon respondent-juvenile's admission to felonious breaking or entering.

Vacated and remanded.

Judges McGEE and ERVIN concur.

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THE VILLAGES AT RED BRIDGE, LLC, PETITIONER V. J. BRENT WEISNER, IN HIS CAPACITY AS CABARRUS COUNTY TAX ADMINISTRATOR, RESPONDENT

No. COA10-723

(Filed 15 February 2011)

**1. Taxation— property valuation—challenge—writ of mandamus—not available**

The trial court did not err by dismissing plaintiff's petition for a writ of *mandamus* to change a property tax valuation where petitioner did not timely challenge the change in valuation of the property before the county board of equalization and review and did not pursue a second means of redress by paying the taxes and bringing a suit for recovery. *Mandamus* is not intended to rescue parties who have allowed the time for their actions to run.

**2. Taxation— property valuation—challenge—statute not applicable**

The plain language of N.C.G.S. § 105-325 suggests that the statute was intended to provide a route for a county tax assessor to correct a property valuation and does not provide an additional remedy to a taxpayer contesting the valuation.

Appeal by petitioner from order entered 17 December 2009 by Judge Tanya T. Wallace in Cabarrus County Superior Court. Heard in the Court of Appeals 30 November 2010.

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*Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by James E. Scarbrough, for petitioner-appellant.*

*Richard M. Koch, Cabarrus County Attorney, for respondent-appellee.*

BRYANT, Judge.

Where a party fails to exhaust the administrative remedies provided by statute, it may not seek a writ of mandamus as an alternative route to judicial review, and a trial court properly dismisses the party's petition for lack of subject matter jurisdiction.

*Facts*

This case concerns a dispute over property tax valuations. Petitioner, The Villages at Red Bridge, L.L.C., owns a forty-acre tract of land ("the property") in the town of Locust in Cabarrus County which it intended to subdivide into one hundred sixteen residential lots. In September 2007, the subdivision administrator of Locust approved and signed a plat for the subdivision, and the plat was recorded with Cabarrus County. Under N.C. Gen. Stat. § 105-285(d), the ad valorem tax value for real property is determined as of 1 January of the year of a general reappraisal. On 1 January 2008, the date of revaluation here, no lots had been sold or were for sale on the property, but the subdivision was under development. Specifically, some of the interior streets had been constructed and some lots had been partially cleared. However, there were no utilities and the subdivision was accessible from the main road only by four-wheel drive vehicles. Respondent J. Brent Weisner, in his capacity as Cabarrus County Tax Administrator, classified the forty acre tract as 116 separate tax parcels with tax values ranging from \$70,000.00 to \$126,000.00.

Cabarrus County mailed notices of changes in tax value to taxpayers in early 2008, but petitioner contends it never received notice regarding the property. Taxpayers have the right to challenge changes in tax valuation at any point up until the county board of equalization and review adjourns; after adjournment, taxpayers are permitted to appeal changes only within thirty days of notice of a change in valuation. In 2008, the board adjourned in early May; petitioner did not appeal its change in valuation prior to that time. Petitioner contends that it did not learn of the change in valuation until October 2008; it believed the change in valuation was erroneous. On 13 January 2009,

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petitioner filed a petition for writ for mandamus in the superior court, seeking a writ and injunction directing respondent “to report the facts to the board of county commissioners in order that the board may make a decision[.]” By order entered 17 December 2009, the superior court dismissed petitioner’s action on grounds that it lacked subject matter jurisdiction. Petitioner appeals.

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In its brief to this Court, petitioner makes fourteen arguments challenging the trial court’s dismissal of its petition for writ of mandamus. However, because these arguments are closely related and overlapping, we summarize and address petitioner’s arguments below in a single analysis.

*Analysis*

**[1]** Petitioner argues that it was entitled to seek a writ mandamus in this action and that the trial court erred in concluding that it had failed to exhaust its administrative remedies and in denying its petition. We disagree.

Various provisions of Chapter 105 of our General Statutes provide a detailed process for taxpayers to challenge or appeal property tax valuations. Section 105-322 establishes county boards of equalization and review. N.C. Gen. Stat. § 105-322 (2009). Under subsection g, these boards are entitled to hear appeals by taxpayers:

(2) **Duty to Hear Taxpayer Appeals.**—On request, the board of equalization and review shall hear any taxpayer who owns or controls property taxable in the county with respect to the listing or appraisal of the taxpayer’s property or the property of others

a. A request for a hearing under this subdivision (g)(2) shall be made in writing to or by personal appearance before the board prior to its adjournment. However, if the taxpayer requests review of a decision made by the board under the provisions of subdivision (g)(1), above, notice of which was mailed fewer than 15 days prior to the board’s adjournment, the request for a hearing thereon may be made within 15 days after the notice of the board’s decision was mailed.

b. Taxpayers may file separate or joint requests for hearings under the provisions of this subdivision (g)(2) at their election.

c. At a hearing under provisions of this subdivision (g)(2), the board, in addition to the powers it may exercise under the provisions

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of subdivision (g)(3), below, shall hear any evidence offered by the appellant, the assessor, and other county officials that is pertinent to the decision of the appeal. Upon the request of an appellant, the board shall subpoena witnesses or documents if there is a reasonable basis for believing that the witnesses have or the documents contain information pertinent to the decision of the appeal.

d. On the basis of its decision after any hearing conducted under this subdivision (g)(2), the board shall adopt and have entered in its minutes an order reducing, increasing, or confirming the appraisal appealed or listing or removing from the tax lists the property whose omission or listing has been appealed. The board shall notify the appellant by mail as to the action taken on the taxpayer's appeal not later than 30 days after the board's adjournment.

N.C.G.S. § 105-322(g). Taxpayers unhappy with the results of their appeals to county boards have further administrative remedies as provided in section 105-290, which establishes the Property Tax Commission:

The Property Tax Commission shall hear and decide appeals from decisions concerning the listing, appraisal, or assessment of property made by county boards of equalization and review and boards of county commissioners. Any property owner of the county may except to an order of the county board of equalization and review or the board of county commissioners concerning the listing, appraisal, or assessment of property and appeal the order to the Property Tax Commission.

N.C. Gen. Stat. § 105-290(b) (2009). Subsection (e) further specifies the time for appealing county-level valuations:

A notice of appeal from an order of a board of county commissioners, other than an order adopting a uniform schedule of values, or from a board of equalization and review shall be filed with the Property Tax Commission within 30 days after the date the board mailed a notice of its decision to the property owner. A notice of appeal from an order adopting a schedule of values shall be filed within the time set in subsection (c).

N.C.G.S. § 105-290(e). If a taxpayer, having exhausted his administrative remedies under Chapter 105, is dissatisfied with the decision of the

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Property Tax Commission, he may then seek judicial review as provided in N.C. Gen. Stat. § 105-345 (2009).

“North Carolina law provides two avenues by which a taxpayer may seek relief from an unjust property tax assessment: administrative review followed by judicial review in the Court of Appeals, and direct judicial review in Superior or District Court. Administrative review begins in the County Board of Equalization and Review.” *Johnston v. Gaston County*, 71 N.C. App. 707, 709, 323 S.E.2d 381, 382 (1984), *cert. denied*, 313 N.C. 508, 329 S.E.2d 392 (1985). To pursue relief via administrative review, a taxpayer follows the steps discussed *supra*. *Id.* Alternatively, a taxpayer “can seek judicial review of an assessment directly in Superior or District Court by paying taxes and then bringing a suit against the taxing unit for recovery of taxes paid.” *Id.* at 711, 323 S.E.2d at 383; *see* N.C. Gen. Stat. § 105-381 (2009). If a taxpayer does not elect to pay the assessed taxes and proceed under section 105-381, he must avail himself of the administrative remedies before the county review board, the Property Tax Commission and, then, the courts of this State. *Id.* at 712, 323 S.E.2d at 384. Our Courts have held that this administrative process provides adequate means for taxpayers to contest valuations “and that [a taxpayer] must exhaust this administrative remedy before he can resort to the courts.” *King v. Baldwin*, 276 N.C. 316, 326, 172 S.E.2d 12, 18 (1970) (reviewing previous version of provisions under Chapter 105 which are the same as those currently in place in pertinent aspects).

Here, petitioner acknowledges in its brief that it failed to timely challenge the change in valuation of the property before the county board of equalization and review, and thus, has lost its right to appeal. We agree. Petitioner also chose not to pursue the second means of redress available to it by paying the taxes and then bringing a suit in the trial court for its recovery under section 105-381. Instead, petitioner filed a petition for writ of mandamus in the superior court. Petitioner argues that it was entitled to a writ because respondent made an error in designating the property as individual lots or tax parcels. Petitioner asserts that this error was not a *valuation* error but rather a *classification* error, although it had the result of producing an incorrect valuation of the property. We believe this contention, even if true, is a distinction without a difference. Section 105-322(g)(2) requires the county board to “hear any taxpayer who owns or controls property taxable in the county *with respect to the listing or appraisal of the taxpayer’s property* or the property of others.” (emphasis added) Likewise, section 105-290(b) states that

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the Property Tax Commission “shall hear and decide appeals from decisions *concerning the listing, appraisal, or assessment of property* made by county boards of equalization and review and boards of county commissioners[.]” (emphasis added) Nothing in these statutes or elsewhere in Chapter 105 suggests that an error of the type alleged by petitioner is not covered by these provisions. As the Supreme Court noted in *King*:

The nature of mandamus and the limitations upon its use have been stated often. It suffices here to say that mandamus issues only to enforce a clear legal right. The writ will not lie to control the discretion vested in a governmental agency or official. It cannot be employed if other adequate means are available to correct the wrong for which redress is sought. Thus, when the legislature has provided an effective administrative remedy, it is exclusive.

*King*, 276 N.C. at 321, 172 S.E.2d at 15 (internal citations omitted). Had it acted in a timely manner as provided by our General Statutes, petitioner could have raised its contentions before the county review board and would have had the opportunity for eventual judicial review. Mandamus is not intended to rescue parties who have allowed the time for their actions to run.

[2] Petitioner also contends that it was entitled to a writ of mandamus pursuant to N.C. Gen. Stat. § 105-325. This statute states that, “[a]fter the board of equalization and review has finished its work and the changes it effected or ordered have been entered on the abstracts and tax records . . . , the board of county commissioners shall not authorize any changes to be made on the abstracts and tax records except as follows” and then provides, in pertinent part:

(6) Subject to the provisions of subdivisions (a)(6)a, (a)(6)b, (a)(6)c, and (a)(6)d, below, to appraise or reappraise property when the assessor reports to the board that, since adjournment of the board of equalization and review, facts have come to his attention that render it advisable to raise or lower the appraisal of some particular property of a given taxpayer in the then current calendar year.

N.C.G.S. § 105-325 (a)(6) (2009). Petitioner contends that section 105-325(a)(6) provides it an additional remedy in contesting the property’s tax valuation and its basis. Specifically, it asserts that it can seek a writ of mandamus to compel respondent to submit “facts”

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to the county commissioners in support of its argument regarding errors in the tax valuation, even though respondent does not believe that “facts have come to his attention that render it advisable to raise or lower the appraisal of some particular property of a given taxpayer in the then current calendar year.”

We must disagree with petitioner’s contention. Were we to accept petitioner’s interpretation under § 105-325(a)(6), we would effectively gut the restrictions on timely appeals pursuant to § 105-322(g). Any taxpayer not satisfied with some aspect of his property tax valuation and seeking a reappraisal could ignore the thirty-day requirement under § 105-322(g) and simply seek a writ to compel a county tax assessor to present the contested “facts” to the relevant board of county commissioners. It is illogical to presume that the General Assembly intended this to be the effect of § 105-325(a)(6) when it had already established a mechanism for taxpayers to contest property tax matters. Rather, the plain language of this provision suggests that it is intended to provide a route for a county tax assessor to seek correction based on errors it has discovered.

Here, respondent, the county tax assessor, does not believe that there are any errors that need to be brought to the attention of the county commissioners. It is petitioner, a taxpayer, who seeks redress. Having missed its opportunity to seek relief in its own right, petitioner cannot compel respondent to act on its behalf. Petitioner’s arguments are overruled.

Affirmed.

Judges STROUD and BEASLEY concur.

**STATE v. GOMEZ**

[209 N.C. App. 611 (2011)]

STATE OF NORTH CAROLINA v. LUIS CASTELLANOS GOMEZ, DEFENDANT

No. COA10-151

(Filed 15 February 2011)

**1. Evidence—recording in Spanish—failure to show abuse of discretion or prejudice**

The trial court did not abuse its discretion by allowing a phone call recording in Spanish between defendant and another person to be played for the jury. Defendant failed to show any actual prejudice. Further, defendant did not argue that the written translation differed in any way from the recording and did not identify how a Spanish-speaking juror might interpret the recording differently from the written translation.

**2. Appeal and Error—preservation of issues—failure to request special instruction**

Although defendant contended that the trial court abused its discretion by failing to instruct the jury at the time of the playing of a recording to rely solely on the court appointed written translation, this argument was dismissed because defendant failed to request any special instructions regarding the recording.

Appeal by defendant from judgments entered on or about 23 June 2009 by Judge R. Allen Baddour, Jr. in Superior Court, Durham County. Heard in the Court of Appeals 30 August 2010.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Brian R. Berman, for the State.*

*Mills & Economos, L.L.P., by Larry C. Economos, for defendant-appellant.*

STROUD, Judge.

Defendant appeals the trial court's (1) admission of a recording in Spanish into evidence when one of the jury members was fluent in Spanish and (2) failure to specifically instruct the jury regarding the recording. For the following reasons, we find no error.

**I. Background**

On or about 2 May 2007, defendant was indicted for conspiracy to commit trafficking in cocaine by possession and conspiracy to commit

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trafficking in cocaine by transportation. On or about 6 October 2008, defendant was indicted for trafficking in marijuana by possession and possession with intent to sell and deliver a Schedule IV controlled substance. During defendant's trial the State moved to admit a recording of phone calls between defendant and other persons into evidence. The recording was in Spanish. Defendant objected to the recording being played for the jury because

[i]t puts everybody on kind of uneven playing ground here. You've got one of the jurors speaks Spanish, we know that. The others don't. Basically we're holding—we're having two different standards of evidence being presented. I would just submit at this point if the State wants to go ahead and introduce, through the proper channels the—the translations so everybody can share them, that's fine; but *I object to one juror being able to—basically be able to understand what's going on*; it's going to be difficult for the rest to hear these circumstances.

The trial court overruled defendant's objection. (Emphasis added.) The jury listened to the recording and also received a written English translation of the recording. The jury found defendant guilty of all four of the charges against him. Defendant appeals.

## II. Recording

Defendant argues that

[t]he court abused its discretion in allowing these Spanish recordings to be played before this jury, with one juror fluent in Spanish, when a written English translation prepared by the court appointed foreign language translator was available to be presented to the jury without the accompanying recording. Moreover, having allowed the playing of the Spanish recordings, the trial court abused its discretion in not instructing the jury, at the time of playing the recording, to rely solely on the court appointed written translation rather than on any individual varying interpretation.

### A. Admission of Recording

**[1]** Defendant contends that admission of the recording was in violation of N.C. Gen. Stat. § 8C-1, Rule 403, which provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of

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undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, Rule 403. Defendant does not argue that the recording was not relevant, but in light of Rule 403, defendant seems to argue that he was unfairly prejudiced by the admission of the recording.

We first note that while defendant is appealing the admission of the recording in Spanish, at least one witness, Mr. Antonio Mendoza, testified at times in Spanish.<sup>1</sup> Defendant has not raised any argument that it was error for the trial court to permit the Spanish-speaking juror to hear Mr. Mendoza’s testimony as well as the English translation of that same testimony. We are unable to discern why testimony given from the witness stand would be any different from the playing of a recording for purposes of defendant’s argument on appeal; nonetheless, we will address defendant’s argument regarding admission of the recording.

Defendant has not challenged the relevancy or authenticity of the recording or the accuracy of the written translation of the recording; defendant’s only argument regarding the recording is that it prejudiced him “by allowing the Spanish-speaking juror to interpret the conversations without relying upon the appointed certified translations.” “Moreover, in order to establish reversible error, a defendant must show prejudice in addition to a clear abuse of discretion on the part of the trial court.” *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989).

We review a trial court’s decision to admit or exclude evidence under Rule 403 for abuse of discretion. We reverse the trial court only when the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

*State v. Locklear*, 363 N.C. 438, 448-49, 681 S.E.2d 293, 302 (2009) (citations and quotation marks omitted).

While defendant frames his argument as a question of admissibility of the recording, defendant is essentially arguing that a Spanish-speaking juror should not be allowed to hear evidence in Spanish presented in the case but should only read the same English translation

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1. While any statements made by a witness in Spanish do not appear in our transcript an interpreter, was present during the testimony of Antonio Mendoza and defendant’s attorney, in his closing argument, addressed the fact that Mr. Mendoza testified at times in Spanish.

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as the other jurors. Defendant directs our attention to *Hernandez v. New York*, 500 U.S. 352, 114 L. Ed. 2d 395 (1991) and *United States v. Perez*, 658 F.2d 654 (9th Cir. 1981). In *Hernandez*, the defendant petitioned the Supreme Court regarding whether the state court had erred in rejecting “his claim that the prosecutor in his criminal trial exercised peremptory challenges to exclude Latinos from the jury by reason of their ethnicity.” *Hernandez* at 355, 114 L. Ed. 2d at 403. In *Perez*, the defendant appealed the trial court’s decision to dismiss a juror who disagreed with a court interpreter about a translation. *Perez* at 662. *Hernandez* and *Perez* address jury selection and jury misconduct respectively; see *Hernandez*, 500 U.S. 352, 114 L. E. 2d 395; *Perez* at 662-63, neither case addresses the admissibility of evidence.

Any issues defendant had with a juror should have properly been addressed in jury selection, particularly as defendant was fully aware that one of the jurors spoke Spanish and English. However, defendant did not seek to challenge the Spanish-speaking juror for cause and did not exhaust his peremptory challenges. *State v. Peele*, 274 N.C. 106, 113, 161 S.E.2d 568, 573 (1968) (“Each party to a trial is entitled to a fair and unbiased jury. Each may challenge for cause a juror who is prejudiced against him. A party’s right is not to select a juror prejudiced in his favor, but to reject one prejudiced against him. In this case, a jury was passed as acceptable by both the State and the defendant. The defendant did not challenge for cause or otherwise any juror on the panel that tried him. The record does not show he exhausted his preemptory [sic] challenges. Objection to the jury was not raised in apt time or in the appointed way. The Court’s action in sustaining the State’s challenges did not violate the defendant’s right to a jury trial.” (citations, quotation marks, and ellipses omitted)), *cert. denied*, 393 U.S. 1042, 21 L. Ed. 2d 590 (1969). However, defendant has not raised any arguments regarding jury selection; defendant’s argument is regarding the admission of evidence. Furthermore, to the extent that defendant’s argument relates to jury selection, we note that his argument appears to be completely the opposite of established case law. While “[o]ur state and federal Constitutions protect a criminal defendant’s right to be tried by a jury of his peers[,]” *State v. Williams*, 355 N.C. 501, 548, 565 S.E.2d 609, 637 (2002) (citations and quotation marks omitted), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808; defendant is essentially arguing that he should *not* have “a jury of his peers[,]” *id.*, for fear that they will “be able to understand what’s going on[.]”

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As to defendant's actual issue on appeal, the admissibility of the recording, defendant fails to show any abuse of discretion on the part of the trial court in allowing the recording into evidence and any actual prejudice that resulted from the recording being played for the jury. Although all languages have various dialects and idioms which must be considered in proper translation, we also note that defendant has not argued that the written translation differed in any way from the recording and has not identified how a Spanish-speaking juror might interpret the recording differently from the written translation. *See generally State v. Aquino*, 149 N.C. App. 172, 178-79, 560 S.E.2d 552, 557 (2002) (concluding that the trial court did not abuse its discretion in allowing an interpreter/investigator to testify about conversations with defendant in Spanish though there are different accents and idioms within the language). Furthermore, defendant has not shown that any possible differences in interpretation prejudiced him in any way. We thus conclude that the trial court did not abuse its discretion in allowing the recording to be played for the jury.

**B. Jury Instructions**

[2] Defendant also contends that "the trial court abused its discretion in not instructing the jury, at the time of playing the recording, to rely solely on the court appointed written translation rather than on any individual varying interpretation." As defendant failed to request any special instructions regarding the recording, we will not address defendant's argument. *See State v. Ward*, 338 N.C. 64, 93, 449 S.E.2d 709, 725 (1994) ("Our rule has long been that where a charge fully instructs the jury on substantive features of the case, defines and applies the law thereto, the trial court is not required to instruct on a subordinate feature of the case absent a special request."), *cert. denied*, 514 U.S. 1134, 131 L. Ed. 2d 1013 (1995), *cert. denied*, 343 N.C. 757, 473 S.E.2d 626 (1996); *State v. Matthews*, 175 N.C. App. 550, 556, 623 S.E.2d 815, 819 (2006) ("To the extent defendant contends he was prejudiced by the lack of limiting instructions, his failure to request such instructions precludes review of that issue on appeal."); *State v. Joyce*, 97 N.C. App. 464, 470, 389 S.E.2d 136, 140 ("Defendant complains that the court gave no limiting instruction as to McCaskill's statement. Defendant, however, failed to request the instruction, and has therefore waived the point on appeal."), *disc. review denied*, 326 N.C. 803, 393 S.E.2d 902 (1990), *cert. denied*, 339 N.C. 619, 454 S.E.2d 263 (1995).

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**III. Conclusion**

We conclude that the trial court did not abuse its discretion in admitting of the recording, and we do not address defendant's argument regarding jury instructions as defendant made no request for special instructions at trial.

NO ERROR.

Chief Judge MARTIN and Judge ERVIN concur.

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ANTHONY HAMMOND, PLAINTIFF v. NAOKO HAMMOND, DEFENDANT

No. COA10-397

(Filed 1 March 2011)

**1. Child Custody and Support— personal jurisdiction— Japanese domestic law**

The trial court did not err in a child custody and child support case by denying defendant mother's motion to dismiss based on lack of personal jurisdiction even though defendant and the parties' children were in Japan. Defendant's due process rights were not offended because plaintiff father made a good faith effort to comply with Rule 4 and with the Hague Service Convention, translating the summons and forwarding his service request to the Central Authority of Japan within a reasonable time. Further, the Japanese clerk of court determined that service was proper under Japanese domestic law.

**2. Child Custody and Support— subject matter jurisdiction— Uniform Child Custody Jurisdiction and Enforcement Act—home state**

The trial court did not err in a child custody and child support case by denying defendant mother's motion to dismiss based on lack of subject matter jurisdiction even though defendant and the parties' children were in Japan. The trial court properly concluded under the Uniform Child Custody Jurisdiction and Enforcement Act that North Carolina was the home state of the parties' minor children at the commencement of the custody action.

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Appeal by Defendant from order entered 15 December 2009 by Judge L. Dale Graham in Iredell County District Court. Heard in the Court of Appeals 26 October 2010.

*Hamilton Moon Stephens Steele & Martin, PLLC, by L. Stanley Brown and Allison C. Pauls, for Defendant-appellant.*

*Anthony W. Hammond, Jr., pro se.*

HUNTER, JR., Robert N., Judge.

Defendant appeals an interlocutory order seeking a determination of whether the trial court erred by denying her Motion to Dismiss Plaintiff's Complaint asserting the trial court lacked personal jurisdiction and subject matter jurisdiction, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) and Rule 12(b)(2). After a careful review of the record, we affirm.

**I. Factual and Procedural Background**

Anthony Hammond ("Plaintiff") and Naoko Hammond ("Defendant") are a married couple with three minor children, all born of the marriage. Defendant is a native of Japan, but lived in the United States for approximately 12 years before commencement of the action that is the subject of this appeal. The Hammonds met in Japan in 1994, moved together to Florida in 1996, and married in 1998. The couple relocated to Iredell County, North Carolina in February 2006 where Defendant gave birth to their third child.

On 16 May 2008, the Hammonds traveled to Japan and visited Defendant's family as they had done numerous times throughout the course of their marriage. Approximately three weeks after their arrival, the couple experienced marital difficulties and Defendant informed Plaintiff of her intent to remain permanently in Japan with their children.

Both parties subsequently retained Japanese attorneys and participated in a series of mediations arranged through the Japanese family court system. Unable to resolve their differences, Plaintiff returned to North Carolina and filed this action on 14 November 2008. Plaintiff's claims for relief include child custody, child support, and equitable distribution. Additionally, Plaintiff made motions for an interim distribution of the marital and divisible property; a temporary restraining order and preliminary injunction preventing Defendant

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from disposing of any such property; a referral to alternative dispute resolution; and a motion for attorney's fees.

On 12 January 2009, Plaintiff applied to the Japanese Ministry of Foreign Affairs for service of his summons, complaint, and related documents upon Defendant at the address where Plaintiff contends Defendant resides: a residential-business complex allegedly shared by Defendant, her mother, and other family members. After forwarding the original summons to the Japanese Ministry of Foreign Affairs, Plaintiff had alias and pluries summonses issued on 13 January 2009, 17 March 2009, and 18 May 2009; these subsequent summonses were not forwarded to Japan for service. The Ministry of Foreign Affairs returned a proof of service certificate stating that service was made upon Defendant's mother at the address specified by Plaintiff on 22 April 2009.

On 24 September 2009, Plaintiff filed an Affidavit of Service averring that he effected service upon Defendant in accordance with article 5(a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters. A proof of service certificate from the Japanese Ministry of Foreign Affairs was attached to the affidavit. In this affidavit, Plaintiff refers to this method of service as "Japanese certified mail."

On 1 October 2009, Defendant filed her Motion to Dismiss Plaintiff's Complaint pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, asserting lack of subject matter jurisdiction, and Rule 12(b)(2), asserting lack of personal jurisdiction.

In support of her motion to dismiss for lack of personal jurisdiction, Defendant submitted an affidavit in which she alleged, *inter alia*, that although she was aware of the existence of the summons and complaint, she had not been served in accordance with Japanese law; that her mother was served with Plaintiff's summons and complaint at her work address, but her mother did not sign the receipt for the summons; that the address was not Defendant's residence nor her mother's residence; that her mother was not authorized to accept service on Defendant's behalf; and that Plaintiff's attempt to serve Defendant via "Japanese certified mail" was not the method of delivery required under Japanese law, which is known as "*tokubetsu sôtatsu*." Additionally, Defendant alleged that she and Plaintiff moved to Japan with the intent to remain permanently and after their arrival separated due to marital difficulties.

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In support of her motion to dismiss for lack of subject matter jurisdiction, Defendant submitted an affidavit in which she alleged that North Carolina was not the “home state” of the couple’s children, as defined by section § 50A-102(7) of our General Statutes, in that the children had not lived in North Carolina for six consecutive months immediately preceding the commencement of Plaintiff’s custody action. Defendant alleged the definition of “home state” required the children to have resided in the state from 14 May 2008 to 14 November 2008. Because the children left North Carolina on 16 May 2008, Defendant contends, North Carolina cannot qualify as their home state. Defendant further alleged that Japan was the children’s home state because Defendant commenced a custody action in Japan on 24 April 2009; Japan is a “state” under section 50A-105(a) of our General Statutes; and the children have resided with Defendant in Japan for more than six consecutive months immediately preceding commencement of the Japanese custody action.

A hearing on Defendant’s motion was held 6 November 2009. Neither party was present, but both were represented by counsel. Plaintiff’s former counsel, Mr. T. Michael Godley, testified as to Plaintiff’s efforts to effect service upon Defendant.

In its 15 December 2010 order, the trial court made, *inter alia*, the following findings of facts:

2. The parties and their children lived together in Iredell County, North Carolina from February, 2006 until May 16, 2008.
3. The parties and the minor children went to Japan on or about May 16, 2008. Plaintiff believed this was for a temporary visit. Upon their arrival in Japan the parties resided with Defendant’s mother in a residential and business compound owned by Defendant’s uncle. This complex was located at 1048 Shimoyoshida Fujiyonshida, Yamanashi, Japan 403-0004. The complex contains at least 3 separate living quarters as well as office space. All residences and offices in the complex shared a common address of 1048 Shimoyoshida Fujiyonshida, Yamanashi, Japan 403-0004.
4. The Defendant, the three minor children, Defendant’s mother and Plaintiff occupied a separate residence within this residential business complex after their arrival.
5. Three weeks after their arrival in Japan, Defendant informed Plaintiff that she intended to remain in Japan permanently.

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Shortly thereafter, Plaintiff was requested to leave the premises which he did. Defendant, the minor children and her mother continued to reside in the mother's residence at [the] 1048 Shimoyoshida address.

6. Plaintiff's former attorney, Michael Godley, applied on January 12, 2009 to the Japanese Ministry of Foreign Affairs for service of the Summons, Complaint and accompanying documents upon Defendant at the 1048 Shimoyoshida address.

7. Plaintiff, through his attorney Mr. Godley, had retained two attorneys in Japan to assist with service of process so as to comply with the Japanese service requirements.

8. The Japanese Ministry of Foreign Affairs forwarded this request along with Plaintiff's documents to Kofu District Court in Kofu City, Yamanachi [sic].

9. These documents, translated into Japanese, were received at Defendant's residence and were accepted by Defendant's mother on April 22, 2009.

10. Defendant was residing at 1048 Shimoyoshida Fujiyonshida, Yamanashi, Japan 403-0004 at the time service of process was completed on April 22, 2009.

11. This action was filed on November 14, 2008 in the Office of Iredell County Clerk of Superior [C]ourt.

Based upon these findings, the trial court concluded as a matter of law: “[t]he service of the summons, complaint and accompanying documents upon Defendant in Japan was proper. The Defendant has actual and legal notice of these proceedings in accordance with Rule 4 of the Rules of Civil Procedure.” Additionally, the trial court concluded that North Carolina “was and is the ‘home state’” of the Hammond's minor children as defined by the Uniform Child-Custody Jurisdiction and Enforcement Act; and the trial court could properly exercise personal jurisdiction over Defendant and subject matter jurisdiction over Plaintiff's claims. The trial court, accordingly, denied Defendant's Motion to Dismiss. Defendant timely filed notice of appeal and filed a motion to stay a 27 April 2010 hearing for child support and interim distribution, pending resolution of her appeal. The trial court granted Defendant's motion to stay as to all proceed-

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ings and concluded the 15 December 2009 Order denying Defendant's Motion to Dismiss affected a substantial right.<sup>1</sup>

**II. Analysis**

Jurisdiction in this Court over an interlocutory order is proper where the appeal is from the denial of a motion to dismiss for lack of personal jurisdiction. N.C. Gen. Stat. § 1-277(b) (2009); *Deer Corp. v. Carter*, 177 N.C. App. 314, 321, 629 S.E.2d 159, 165-66 (2006). Upon review of a trial court's ruling as to personal jurisdiction over a party, this Court "‘considers only whether the findings of fact by the trial court are supported by competent evidence in the record; . . . [w]e are not free to revisit questions of credibility or weight that have already been decided by the trial court.’" *Carter*, 177 N.C. App. at 321, 629 S.E.2d at 165 (quoting *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694-95, 611 S.E.2d 179, 183 (2005)) (internal quotation marks omitted). Further, “[i]f the findings of fact are supported by competent evidence, we conduct a *de novo* review of the trial court’s conclusions of law and determine whether, given the facts found by the trial court, the exercise of personal jurisdiction would violate [the] defendant’s due process rights.” *Id.* at 321-22, 629 S.E.2d. at 165.

**A. Personal Jurisdiction**

[1] First, Defendant argues the trial court erred in denying her motion to dismiss for lack of personal jurisdiction as Plaintiff failed to effect service of process in accordance with North Carolina law and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, November 15, 1965, 20 U.S.T. 361 (hereinafter “Hague Service Convention” or “Convention”). We disagree.

“The purpose and aim of the service of the summons are to give notice to the party against whom the proceeding or action is commenced, and any notification which reasonably accomplishes that purpose answers the claims of law and justice.” *Jester v. Steam Packet Co.*, 131 N.C. 54, 55, 42 S.E. 447, 447 (1902). It is “[t]he legislative power of the State in which the action is commenced [that] is charged

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1. On 25 August 2010, Defendant filed a motion requesting that we strike Plaintiff's brief or, in the alternative, strike portions of his brief. While we did not strike Plaintiff's brief in its entirety, we allow Defendant's motion and strike those pages that contain evidence not included in the record. Accordingly, in reaching our decision, we have not relied upon any portion of Plaintiff's brief that contains evidence not included in the record.

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with the duty and responsibility of prescribing the rules governing in such matters, and its action is not reviewable, unless it should plainly appear that the notice did not amount to ‘due process of law.’ ” *Id.*

For actions filed in North Carolina, Rule 4 of the North Carolina Rules of Civil Procedure establishes the requirements for service of process upon a defendant. N.C. Gen. Stat. § 1A-1, Rules 3(a), 4 (2009). When serving a defendant in a foreign country, we begin our inquiry into the validity of service with Rule 4(j3).<sup>2</sup> W. Mark C. Weidemaier, Univ. N.C. Sch. Gov’t, *International Service of Process Under the Hague Convention*, Admin. Just. Bull. No. 2004/07, Dec. 2004, at 3. Rule 4(j3) provides several means to effect service of process in foreign countries. N.C. Gen. Stat. § 1A-1, Rule 4(j3). Relevant to the instant appeal, Rule 4(j3)(1) states, in part, that service may be effected upon an individual in a foreign county “[b]y any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents.” *Id.* § 1A-1, Rule 4(j3)(1).

As Japan and the United States are signatories to the Hague Service Convention, its procedures must be followed “in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.” Hague Service Convention, *supra*, at art. 1; *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699, 100 L. Ed. 2d 722, 730 (1988). In *Schlunk*, the United States Supreme Court concluded that in a legal action it is the law of the forum state that determines when there is an “occasion to transmit” a document “for service abroad”; thus, it is the law of the forum state that determines when the Hague Service Convention applies. *Schlunk*, 486 U.S. at 700, 100 L. Ed. 2d at 731. As noted above, Rule 4(j3) permits service of a defendant in foreign country by means authorized by the Convention. N.C. Gen. Stat. § 1A-1, Rule 4(j3)(1). Thus, the Convention and our Courts’ interpretations of its provisions control the analysis of personal jurisdiction in the instant appeal. *E.g., Tataragasi v. Tataragasi*, 124 N.C. App. 255, 263, 477 S.E.2d 239, 243 (1996) (applying the Hague Service Convention requirements for service of process in a custody proceeding where the defendant father resided in Turkey), *disc. review denied*, 345 N.C. 760, 485 S.E.2d 309 (1997).

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2. Unless otherwise noted, our references to “Rule” in this opinion refer to the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1 (2009).

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The Hague Service Convention “was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad.” *Schlunk*, 486 U.S. at 698, 100 L. Ed. 2d at 730; *Hayes v. Evergo Tel. Co., Ltd.*, 100 N.C. App. 474, 476, 397 S.E.2d 325, 327 (1990). To this end, the Convention requires each signatory state to establish a Central Authority to facilitate the service of documents from foreign countries. Hague Service Convention, *supra*, at art. 2. When such requests for service are received, article 5 of the Convention requires the Central Authority to serve the accompanying documents in a manner that comports with the receiving country’s domestic laws. *Id.* at art. 5; *Schlunk*, 486 U.S. at 699, 100 L. Ed. 2d at 730. After service is effected, the Central Authority is required to complete a proof of service certificate that states the manner in which the documents were served, the place and date of service, and the person on whom the documents were served; this certificate must then be returned to the party that requested service. Hague Service Convention, *supra*, at art. 6; *Schlunk*, 486 U.S. at 699, 100 L. Ed. 2d at 730.

In Japan, service (*sôtatsu*) is a judicial function, performed exclusively by Japanese courts; litigants may not effect service as permitted in the United States. Takaaki Hattori & Dan Fenno Henderson, *Civil Procedure in Japan* § 7.07[7][a], at 7-22 (2nd ed. 2009); G. Brian Raley, *A Comparative Analysis: Notice Requirements in Germany, Japan, Spain, the United Kingdom and the United States*, 10 Ariz. J. Int’l & Comp. L. 301, 317 (1993). The clerk of court prescribes the method of service through the postal service or through a bailiff. Hattori & Henderson, *supra*, § 7.07[7][a], at 7-22. A special stamp affixed by the clerk to the envelope containing the legal documents served evidences service executed via the mail (*tokubetsu sôtatsu*). *Id.*

Under Japanese domestic law, service of process in Japan may also be effected by personal service (*kôfu sôtatsu*), substituted service (*hojû sôtatsu*), by a registered mail carrier specified by the Japanese Supreme Court, by public notice (*kôji sôtatsu*), or even by leaving the documents at the place service should be made when service is unjustifiably refused by the addressee (*sashioki sôtatsu*). *Id.* § 7.07[7][b] to [e], [g], at 7-22 to 7-25. Each method entails its own procedural requirements specified in the Japanese Code of Civil Procedure. *See id.*

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Pursuant to article 2 of the Convention, Japan designated the Ministry of Foreign Affairs as the Central Authority to receive requests for service from abroad. Raley, *supra*, at 316; Hague Service Convention, *supra*, at art. 2. The Convention also prescribes the manner of proof of service, which is to be completed by the Central Authority. Hague Service Convention, *supra*, at arts. 6, 21. As required by article 21(b), Japan has designated its district courts as the sole authority competent to complete the proof of service certificate required under article 6. Hattori & Henderson, *supra*, § 15.02[1], at 15-7 n.13.

In the instant case, Defendant argues that the trial court lacked personal jurisdiction over her as Plaintiff's attempt to effect service of process was not executed in accordance with the Hague Service Convention or with North Carolina law. Specifically, Defendant contends that service was not proper for three reasons.

First, Defendant argues Plaintiff failed to assert in his Affidavit of Service that the pleadings were served using the special mail service, *tokubetsu sôtatsu*, or to include any evidence of such service. Rather, Defendant insists, Plaintiff sent the documents via certified mail, an unauthorized method of service under the Hague Service Convention for service of process in Japan.

As indicated above, the trial court found that Plaintiff applied to the Japanese Ministry of Foreign Affairs for service of the Summons, Complaint, and related documents upon Defendant; the Japanese Ministry of Foreign Affairs then forwarded these documents to the district court in Yamanashi, Japan; and the documents were served upon Defendant's mother at Defendant's residence in Yamanashi. These findings are supported by Plaintiff's Affidavit of Service averring to his request for service in conformity with article 5(a) of the Hague Service Convention; by a copy of his request for service to the Japanese Ministry of Foreign Affairs, submitted on the request form approved under the Convention; and by the proof of service certificate returned by the Ministry of Foreign Affairs indicating the documents were served by the clerk of court in accordance with article 5(a) of the Convention.

Although Defendant filed an affidavit countering Plaintiff's averments, and both parties were heard at the hearing on Defendant's motion to dismiss, the trial court found the facts to be as Plaintiff alleged. Because we conclude the findings of fact are supported by

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competent evidence, they are binding upon this court.<sup>3</sup> *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524, *disc. review denied*, 303 N.C. 314, 281 S.E.2d 651 (1981) (“The trial judge’s findings of fact when supported by competent evidence are conclusive upon this Court even when there is conflict in the evidence.”).

Second, Defendant argues that service was improper because the summons, complaint, and related documents were served upon Defendant’s mother, not upon Defendant directly. We disagree.

Despite Defendant’s contentions otherwise, direct service upon a defendant is not the only means of service permitted under Japanese law. See Japanese Code of Civil Procedure (*Minji soshō-hō*), Law No. 109, arts. 103, 105, 106, 107, 110 (1996) (amended 2007) (authorizing direct service, substituted service, service where defendant is found, service by registered mail, and service by publication).<sup>4</sup> Under Japanese law, when a defendant cannot be served personally, substituted service is permissible upon an employee or occupant of the defendant’s domicile, residence, or place of business provided that person is “capable of understanding that service is being made.” Hattori & Henderson, *supra*, § 7.02[7][c], at 7-24.

Here, the trial court found that Defendant and her mother shared a residence in a residential-business compound located at 1048 Shimoyoshida Fujiyonshida, Yamanashi, Japan 403-0004; that Defendant’s mother was served at this address on 22 April 2009; and that Defendant was residing at this address on the date of service.

The record reveals that these findings are supported by Plaintiff’s affidavit as well as an affidavit from an acquaintance of the Hammond family who avers he is a Japanese citizen living in Japan; that the Hammonds resided at 1048 Shimoyoshida Fujiyonshida, Yamanashi, Japan 403-0004 during their multiple visits to Japan over the years; and that Defendant’s mother lives at this same address. Furthermore, the Japanese clerk of court determined that service was proper as evidenced by the completed certificate of service. Had proper service not been possible, the Hague Service Convention requires the clerk to return the documents to Plaintiff explaining the circumstances that

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3. We are not persuaded by Defendant’s insistence that Plaintiff’s reference to this method of service as “Japanese certified mail” is evidence that Plaintiff failed to use a proper form of service. Plaintiff’s counsel explained he merely referred to the method of delivery as “Japanese certified mail” for lack of a better description.

4. For an English translation see Takaaki Hattori & Dan Fenno Henderson, *Civil Procedure in Japan* (2nd ed. 2009).

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prevented service upon Defendant. Hague Service Convention, *supra*, at art. 6. Additionally, we note that courts of other jurisdictions have found the “‘return of a completed certificate of service is *prima facie* evidence that the [Central] Authority’s service’ was made in compliance with that country’s law.” *In re S1 Corp. Sec. Litig.*, 173 F. Supp. 2d 1334, 1344 (N.D. Ga. 2001) (quoting *Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1390 (8th Cir. 1995)).

Through his counsel, Plaintiff asserted at the hearing on Defendant’s Motion to Dismiss that this proof of service certificate states that service was effected on defendant’s mother who “resides with addressee” and made in compliance with article 5(a) of the Convention. Defendant acknowledges that her mother was served at her place of work, but insists the address is not her mother’s residence. This conflict in the evidence is not for this Court to resolve; the trial court’s findings are supported by competent evidence and they are thus binding upon this Court. *Fungaroli*, 51 N.C. App. at 367, 276 S.E.2d at 524.

Third, Defendant argues service was ineffective because the summons served was dormant upon receipt. We disagree.

Plaintiff’s original summons was issued on 14 November 2008. After forwarding the original summons to the Japanese Ministry of Foreign Affairs on 12 January 2009, Plaintiff had alias and pluries summonses issued on 13 January 2009, 17 March 2009, and 18 May 2009; there is no evidence that these subsequent summonses were forwarded to Japan for service. The proof of service certificate from the Ministry of Foreign Affairs states that service was made upon Defendant’s mother at the address specified by Plaintiff on 22 April 2009—one hundred and fifty-eight days after issuance.

In support of her argument, Defendant cites this Court’s ruling in *Huggins v. Hallmark Enterprises, Inc.*, 84 N.C. App. 15, 19, 351 S.E.2d 779, 781-82 (1987), in which we held the trial court could not exercise personal jurisdiction over a defendant served with a dormant summons. We observed in *Huggins* that when the sheriff’s office returned the plaintiff’s summons unserved (within the time prescribed by Rule 4(c)) the summons was dormant and unserveable, but capable of being revived through endorsement of the summons or issuance of an alias or pluries summons under Rule 4(d). *Id.* at 18-19, 351 S.E.2d at 781. The plaintiff in *Huggins*, however, did not revive the original summons, but served the dormant summons upon the

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defendant's registered agent. *Id.* Consequently, we concluded the defendant was not subject to the jurisdiction of the trial court by service of the original summons. *Id.* *Huggins* is distinguishable, however, because of the plaintiff's failure to revive the summons under Rule 4(d), and because service upon the defendant was executed in North Carolina, not in a foreign country. *Id.* at 18, 351 S.E.2d at 781.

As described above, Rule 4(j3) and the Hague Service Convention control our analysis in the instant case. Because the United States and Japan are signatories to the Hague Service Convention and the instant case is a civil case in which "there is occasion to transmit a judicial or extrajudicial document for service abroad," the requirements of the Convention control service of process upon Defendant. Hague Service Convention, *supra*, at art. 1; *Schlunk*, 486 U.S. at 699, 100 L. Ed. 2d at 730; N.C. Gen. Stat. § 1A-1, Rule 4(j3)(1). Moreover, "[b]y virtue of the Supremacy Clause, U.S. Const., Art. VI, the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies." *Schlunk*, 486 U.S. at 699, 100 L. Ed. 2d at 730. Thus, the mandates of Rule 4 must yield where they conflict with service as prescribed by the Convention.

Article 5 of the Hague Service Convention requires the Central Authority of the state addressed to execute requests for service in a manner that comports with that state's domestic laws. Hague Service Convention, *supra*, at art. 5; *Schlunk*, 486 U.S. at 699, 100 L. Ed. 2d at 730. The Convention does not, however, require each contracting state's Central Authority to establish a time limit for executing service requests. 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1133 (3d ed. 2002). In fact, article 15 of the Convention provides that a default judgment may be entered against a defendant when no certificate of service has been returned, but only after a six month period has elapsed since transmission of the documents to the Central Authority. Hague Service Convention, *supra*, at art. 15.

More specifically, the domestic laws of Japan require that a more relaxed time frame than that provided in Rule 4(c) must be permitted in order to effect service of process upon Defendant. Our review of the Japanese Code of Civil Procedure reveals no time limit for service of process upon a defendant; nor does Defendant cite to such a limitation. The Permanent Bureau of the Hague Conference on Private International Law, the intergovernmental organization

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responsible for the adoption of the Hague Service Convention, periodically surveys signatories to the Convention on the practical operation of the Convention including the average time required to execute service requests. In response to questions by the Permanent Bureau in 2008 as to the timeliness of service requests received by the state's Central Authority, the Japanese delegation replied that Japanese domestic law does not require judicial and extrajudicial documents be served within a specific time. Permanent Bureau, Hague Conference on Private International Law, *Synopsis of Responses to the Questionnaire of July 2008 Relating to the Hague Convention of 15 November 1965 on the Service Abroad of the Judicial and Extrajudicial documents in Civil or Commercial Matters* 111-12, 2009, available at <http://www.hcch.net> (Conventions, Hague Service Convention, Questionnaires & Responses). The Permanent Bureau also reports that the average time for execution of a service request by the Japanese Ministry of Foreign Affairs is approximately four months. Permanent Bureau, Hague Conference on Private International Law, <http://www.hcch.net> (Authorities, Japan—Central Authority & Practical Information) (last updated May 15, 2009).

Given that the ability to effect service of process in Japan is exclusively a function of the Japanese judiciary<sup>5</sup> (see Hattori & Henderson, *supra*, § 7.02[7][a], at 7-21), Plaintiff has no practical means to effect service upon Defendant within the 60-day time constraint of Rule 4(c), creating a conflict between our General Statutes and the Convention. See N.C. Gen. Stat. § 1A-1, Rule 4(c) (2009). Therefore, Rule 4(c)'s requirement of service of the summons within 60 days after its issuance does not control Plaintiff's service. Rather, the requirements of Rule 4 must be harmonized with the Hague Service Convention while preserving Defendant's due process rights.

Additionally, Rule 4(d) permits continuation of an action when a "defendant in a civil action is not served within the time allowed for service" by issuance of an alias or pluries summons anytime within two years of the issuance of the original summons or after a prior

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5. The Hague Service Convention permits a contracting state to serve judicial documents on persons abroad through the requesting state's diplomatic and consular agents, unless the state in which service is to be made objects to this form of service. Hague Service Convention, *supra*, at art. 8. While Japan has, to date, expressed no opposition to diplomatic and consular service under article 8 of the Convention, the Code of Federal Regulations prohibits such service by the United States Foreign Service, except in limited circumstances that do not apply here. See 22 C.F.R. § 92.85 (2009).

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alias or pluries summons when serving a defendant outside of the United States. N.C. Gen. Stat. § 1A-1, Rule 4(d); *Roselli v. Sperry*, 63 N.C. App. 509, 511-12, 305 S.E.2d 218, 219, (“The purpose of Rule 4(d) is only to keep the action alive by means of an endorsement on the original summons or by issuance of an alias or pluries summons in situations where the original, properly directed summons was not yet served.”), *disc. review denied*, 309 N.C. 633, 308 S.E.2d 716 (1983). Plaintiff abided by Rule 4(d) in that he had an alias summons issued on 13 January 2009, and pluries summonses issued on 17 March 2009 and 18 May 2009. While these summonses were issued more frequently than is required, Rule 4(d) permits additional alias and pluries summonses to be issued “*at any time within two years* of the issuance of the original summons” or alias or pluries summons to keep the action alive. N.C. Gen. Stat. § 1A-1, Rule 4(d) (emphasis added).

As the North Carolina Rules of Civil Procedure are similar to the Federal Rules of Civil Procedure, we find interpretations of the Federal Rules by other jurisdictions helpful to our analysis. *See Sutton v. Duke*, 277 N.C. 94, 101, 176 S.E.2d 161, 165 (1970) (“[S]ince the federal and, presumably, the New York rules are the source of NCRCP we will look to the decisions of those jurisdictions for enlightenment and guidance . . . .”). Rule 4 of the North Carolina Rules of Civil Procedure approves of the Hague Service Convention for service of foreign defendants, as does Rule 4 of the Federal Rules. Fed. R. Civ. P. 4(f). Under the Federal Rules, however, the time limit prescribed for service of a summons under Rule 4(m) does not apply when serving a defendant in a foreign country. Fed. R. Civ. P. 4(m); Wright & Miller, *supra*, § 1134 (“Because amended Rule 4(f)(1) specifically refers to the Hague Convention as among the permissible means of service of process in a foreign country, service made pursuant to that treaty, explicitly falls within the foreign service exception to the 120-day time limit for completing process set out in amended Rule 4(m) . . . .”); *see also BDL Int'l v. Sodetal USA, Inc.*, 377 F. Supp. 2d 518, 521 n.4 (D.S.C. 2005) (“While it governs domestic entities, Rule 4(m)’s time limit does not apply to foreign individuals or corporations.”); *Young’s Trading Co. v. Fancy Import, Inc.*, 222 F.R.D. 341, 343 (W.D. Tenn. 2004) (noting Rule 4(m) 120-day limit did not apply to service of the defendant in Korea); *In re S1 Corp. Sec. Litig.*, 173 F. Supp. 2d at 1343 (noting “service pursuant to Rule 4(f) is not subject to the 120 day period of Rule 4(m) and the trend of courts is to find that the 120 day period does not apply even if the plaintiff makes no attempt to serve within the period”).

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Rule 4(j3) of the North Carolina Rules of Civil Procedure emphasizes actual notice over strict formalism by permitting service under the Hague Service Convention as an “internationally agreed *means reasonably calculated* to give notice,” N.C. Gen. Stat. § 1A-1, Rule 4(j3)(1) (emphasis added)—a means of service to which the Convention does not prescribe a time limit other than that it be made in “sufficient time.” Hague Service Convention, *supra*, art. 1. In *Tataragsi*, we recognized that a plaintiff’s good faith effort to effect service under the Hague Service Convention “allows a court to apply the more liberal standards of Rule 4” when “analyzing the propriety of service.” 124 N.C. App. at 263, 477 S.E.2d at 243. As one federal court noted, the federal Rule 4

stresses actual notice, rather than strict formalism. There is no indication from the language of the Hague [Service] Convention that it was intended to supercede [sic] this general and flexible scheme, particularly where no injustice or prejudice is likely to result to the party located abroad, or to the interests of the affected signatory country. The Hague [Service] Convention should not be construed so as to foreclose judicial discretion when such discretion needs to be exercised. In this instance, plaintiff has, in good faith, attempted to abide by the provisions of the Hague [Service] Convention.

*Fox v. Regie Nationale des Usines Renault*, 103 F.R.D. 453, 455 (W.D. Tenn. 1984) (internal citations omitted) (refusing to fault the plaintiff for a defect in service made by the Central Authority of France and concluding service was valid). Similarly, we conclude that when a plaintiff demonstrates a good faith effort to effect service upon a foreign defendant under the Hague Service Convention pursuant to Rule 4(j3) of the North Carolina Rules of Civil Procedure, the trial court is permitted to exercise discretion in finding service valid where the circumstances presented would not offend the defendant’s due process rights.

Here, we find Plaintiff has made a good faith effort to comply with Rule 4 and with the Hague Service Convention, translating the summons and forwarding his service request to the Central Authority of Japan within a reasonable time. The Japanese Ministry of Foreign Affairs effected service in compliance with Japanese domestic law—while Plaintiff kept his action alive through the issuance of alias and pluries summonses pursuant to Rule 4(d)—and Defendant received actual notice of Plaintiff’s action as evidenced by her Motion to

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Dismiss. We conclude the trial court's exercise of personal jurisdiction over Defendant will not offend her due process rights and the trial court did not err in denying her Motion to Dismiss for lack of personal jurisdiction.

**B. Subject Matter Jurisdiction**

[2] Defendant also argues that the trial court erred in denying her Motion to Dismiss for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. Specifically, Defendant contends that the trial court cannot exercise jurisdiction over Plaintiff's child-custody action because North Carolina is not the children's "home state" as defined by the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"), codified in our General Statutes as Chapter 50A, sections 50A-101 to -317. We disagree.

On review of a trial court's denial of a motion to dismiss for lack of subject matter jurisdiction, the lower court's findings of fact are binding on this Court when supported by competent evidence; we review its conclusions of law *de novo*. *Burton v. Phoenix Fabricators & Erectors, Inc.*, 194 N.C. App. 779, 782, 670 S.E.2d 581, 583, *disc. review denied*, 363 N.C. 257, 676 S.E.2d 900 (2009).

As no court has previously entered a custody order pertaining to the Hammond's children, Plaintiff's action seeks an initial child-custody determination. N.C. Gen. Stat. § 50A-102(8) (2009). Section 50A-201 of our General Statutes provides four alternative bases by which the district court may establish subject matter jurisdiction to enter an initial child-custody determination. N.C. Gen. Stat. § 50A-201 (2009). In the instant case, the trial court concluded subject matter jurisdiction was proper on the basis that North Carolina "was and is the 'home state' " of the Hammond's children under the UCCJEA. Accordingly, our discussion is limited to the determination of the children's "home state," and we do not address the alternative bases for jurisdiction under section 50A-201.

Section 50A-201(a) provides, in part, that a trial court may establish jurisdiction to make an initial child-custody determination, if

[t]his State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State.

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N.C. Gen. Stat. § 50A-201(a)(1) (2009). The “home state” is defined as “the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding.” *Id.* § 50A-102(7). Furthermore, “[a] period of temporary absence of any of the mentioned persons is part of the period.” *Id.*

Thus, section 50A-201(a)(1) provides two scenarios in which North Carolina may qualify as a child’s home state: first, when “this State *is* the home state” on the date of the commencement of the custody action; second, when this state “*was* the home state” within the six months preceding commencement of the custody action. *Id.* § 50A-201(a)(1) (emphasis added). Both scenarios also require the child be absent from North Carolina and that a parent or person acting as such still resides in the state. *Id.* Although there is no specific finding of fact in the trial court’s order regarding the father’s residency in this state, no party contests that Plaintiff still resides in North Carolina. For the reasons discussed below, we conclude North Carolina qualifies as the home state of the Hammond’s children under both scenarios permitted by section 50A-201(a)(1).

Defendant argues that the trial court failed to make sufficient findings regarding the residence of the children for the six months immediately before the commencement of the action to support its conclusion that North Carolina is the home state of the Hammond’s children. We disagree.

As quoted above, the trial court found that the Hammonds and their children lived together in Iredell County for more than two years before their departure for Japan on 16 May 2008; that Plaintiff believed the family’s visit to Japan was a temporary visit; that Defendant informed Plaintiff of her intentions to remain permanently in Japan, with their children, weeks after their arrival; and that Plaintiff filed this action on 14 November 2008. The record reveals these findings are supported by competent evidence including Plaintiff’s and Defendant’s affidavits. Plaintiff contends in his affidavit that the family’s last trip to Japan was not intended to be permanent as the family had taken many temporary trips to Japan in order to visit Defendant’s family; that shortly before leaving he applied for a job in North Carolina; and that he and Defendant had jointly enrolled their children in private school for the following school year and had paid the tuition in full. Defendant does not address her husband’s assertion that both parties enrolled the chil-

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dren in private school for the following school year. Additionally, her statement as to when she told her husband she intended to remain permanently in Japan is vague, and it is reasonable to interpret the statement to indicate she did not tell her husband of her intent to remain in Japan until after they arrived in Japan. In her appellate brief, Defendant contends that she told her husband of her intention to remain in Japan only after their arrival in that country. As indicated in its findings, the trial court believed the facts as set forth by Plaintiff and, as they are supported by competent evidence, the findings are binding upon this Court. “[W]e are not free to revisit questions of credibility or weight that have already been decided by the trial court.” *Carter*, 177 N.C. App. at 321, 629 S.E.2d at 165-66 (quotations marks omitted).

Defendant also insists that because the children did not live in this state for six consecutive months immediately before Plaintiff filed this action, North Carolina cannot be the children’s home state. We disagree.

Under the UCCJEA, the “home state” definition permits a court to include a temporary absence of a parent or child from the state within the six months before the filing of the custody action as time residing in North Carolina. N.C. Gen. Stat. § 50A-102(7). This Court has held that the proper method for determining whether an absence from the state is a temporary absence is by assessing the totality of the circumstances. *Chick v. Chick*, 164 N.C. App. 444, 449, 596 S.E.2d 303, 308 (2004). In *Chick*, we noted the totality of the circumstances test encompasses the length of the absence and the intent of the parties. *Id.* at 450, 596 S.E.2d at 308. The test also permits greater flexibility than other tests by allowing for the “consideration of additional circumstances that may be presented in the multiplicity of factual settings in which child custody jurisdictional issues may arise.” *Id.*

In the instant case, we conclude the children’s absence from North Carolina is a temporary absence. Our conclusion is supported by the residency of the Hammond’s children in North Carolina for over two years before their departure to Japan, coupled with the evidence of Plaintiff’s intent that he and his family would return to our state. We recognize the absence of the children from North Carolina is for almost the entire six months before the commencement of this action. This Court, however, has previously found absences of similar length to be temporary in nature, especially when a lengthy residency in North Carolina preceded the absence. See *Schrock v.*

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*Schrock*, 89 N.C. App. 308, 311, 365 S.E.2d 657, 659 (1988) (concluding an absence from North Carolina for four of the six months immediately before the filing of the custody action was a temporary absence); *Pheasant v. McKibben*, 100 N.C. App. 379, 384, 396 S.E.2d 333, 336 (1990) (concluding children's absence from North Carolina, pursuant to a temporary custody decree, for all but seven weeks of the six months immediately before the filing of the custody action was a temporary absence).

Defendant further argues the trial court erred in concluding as a matter of law that North Carolina "was and is the 'home state'" of the Hammond's children. In support of this argument, Defendant relies upon an apparent misreading of our General Statutes' definition of "home state." Defendant cites the definition of "home state" in section 50A-102(7) and insists that because the children have lived in Japan since 16 May 2008 they had not lived in North Carolina "for at least six consecutive months immediately before the commencement of [the] child-custody proceeding" on 14 November 2008. N.C. Gen. Stat. § 50A-102(7). Defendant's reliance is misplaced for two reasons: her argument ignores the second of the two scenarios prescribed by section 50A-201(a) for establishing this State as the home state; and ignores that section 50A-201(a), not 50A-102(7), is the exclusive basis for establishing jurisdiction for a child-custody proceeding in North Carolina pursuant to section 50A-201(b). N.C. Gen. Stat. § 50A-201(b) (2009) ("Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State.").

Were we to adopt Defendant's interpretation of the home state analysis we would impermissibly render the second scenario in section 50A-201(a) to be surplusage. *See Domestic Elec. Service, Inc. v. City of Rocky Mount*, 285 N.C. 135, 143, 203 S.E.2d 838, 843 (1974) ("The presumption is that no part of a statute is mere surplusage, but each provision adds something which would not otherwise be included in its terms."). Adhering to a basic tenant of statutory construction, we must read sections 50A-102(7) and 50A-201(a) *in pari materia*. *Barnes v. Erie Ins. Exch.*, 156 N.C. App. 270, 278, 576 S.E.2d 681, 686, ("Statutes *in pari materia*, although in apparent conflict or containing apparent inconsistencies, should, as far as reasonably possible, be construed in harmony with each other so as to give force and effect to each . . . ."), *disc. review denied*, 357 N.C. 457, 585 S.E.2d 382 (2003) (internal citations and quotations marks omitted). Thus, Defendant's argument implicitly restricting the "home state" to that

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state in which the children resided at the commencement of the proceeding is without merit.

We find further support for our conclusion in case law decided under the predecessor to the UCCJEA—the UCCJA, the Uniform Child Custody Jurisdiction Act. N.C. Gen. Stat. §§ 50A-1 to 50A-25 (repealed Oct. 1, 1999); 1999 N.C. Sess. 525. Under the UCCJA, this Court held in *Hart v. Hart*, 74 N.C. App. 1, 7, 327 S.E.2d 631, 635 (1985), that North Carolina was the home state of the litigants' children where it was alleged the children had lived in this state for more than one year when they were removed to Florida for a two-and-a-half month absence immediately preceding commencement of the custody action in North Carolina. Those facts, we concluded, satisfied the residency requirement of section 50A-3(a)(1)(ii) (predecessor of section 50A-201(a)) such that North Carolina “*had been* the [children’s] home state *within six (6) months* before commencement of the proceeding” *Id.* at 7, 327 S.E.2d at 636 (emphasis added). Thus, while the children were absent from this state for a significant period upon commencement of the custody action—as in the instant case—North Carolina qualified as the home state.<sup>6</sup>

Additionally, the Hammond children did not live in Japan for six consecutive months before commencement of the Plaintiff's custody proceeding. Rather, North Carolina is the last state in which the children lived for six consecutive months before their departure for Japan and Plaintiff's commencement of the custody proceeding. Therefore, the trial court did not err by concluding North Carolina “was and is the ‘home state’ ” of the children under the UCCJEA and by denying Defendant's Motion to Dismiss.

**III. Conclusion**

We conclude the trial court did not err in denying Defendant's Motion to Dismiss for lack of personal jurisdiction and lack of subject matter jurisdiction. The trial court's findings of fact were supported by competent evidence. Our *de novo* review of the trial court's conclusions of law leads us to conclude that the trial court's exercise of personal jurisdiction over Defendant does not offend her due

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6. We note that while the definition of “home state” under the UCCJA (N.C. Gen. Stat. § 50A-2(5) (repealed Oct. 1, 1999)) differs from the definition under the UCCJEA (N.C. Gen. Stat. § 50A-102(7)), upon enactment of the UCCJEA the General Assembly noted, “[t]he definition of ‘home State’ has been reworded slightly. No substantive change is intended from the UCCJA.” Official Comment, N.C. Gen. Stat. § 50A-102 (2009).

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process rights. Furthermore, the trial court properly concluded North Carolina was the “home state” of the parties’ minor children at the commencement of the custody action as defined under the UCCJEA. Accordingly, the trial court has subject matter jurisdiction to make the initial child-custody determination.

Affirmed.

Judges McGEE and BEASLEY concur.

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JERRY ALAN REESE, PLAINTIFF v. BROOKLYN VILLAGE, LLC AND MECKLENBURG COUNTY, NORTH CAROLINA, DEFENDANTS

No. COA09-1412

(Filed 1 March 2011)

**1. Collateral Estoppel and Res Judicata— due process and equal protection claims previously litigated—constitutionality of session laws previously justiciable**

The trial court did not err by granting defendant county’s motion for judgment on the pleadings based on *res judicata* and collateral estoppel. Plaintiff’s claims for due process and equal protection had been previously litigated between plaintiff and the county, and a final decision on the merits dismissing these claims had been entered. Plaintiff should have raised the issues concerning the validity of the Brooklyn Village Contract and the county’s actions in entering into the contract no later than *Reese III*. Further, the constitutionality of Session Laws 2000-65 and 2007-33 were justiciable at the time of *Reese I* and *Reese II*.

**2. Collateral Estoppel and Res Judicata— pleadings—dispositive orders—scope of prior litigation between parties**

The trial court did not err by denying plaintiff’s motion to strike the county’s defenses of *res judicata* and collateral estoppel, and by denying plaintiff’s motion to strike the pleadings and dispositive rulings from *Reese I*, *Reese II*, and *Reese III*. The defenses were determinative of the issues. Further, the pleadings and dispositive orders were necessary for a proper determination of the scope of prior litigation between the parties within the context of the defenses.

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**3. Declaratory Judgments— disposition of property—motion to dismiss—enforceability of agreements**

The trial court did not err in a declaratory judgment action regarding the disposition of property by granting defendant company's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) because the agreements between defendants were lawful and enforceable.

Appeal by Plaintiff from order entered 21 May 2009 by Judge W. David Lee in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 April 2010.

*Jerry Alan Reese, Plaintiff-Appellant, Pro Se.*

*K & L Gates LLP, by Kiran H. Mehta, for Defendant-Appellee Brooklyn Village, LLC.*

*Womble Carlyle Sandridge & Rice, PLLC, by James P. Cooney III and G. Michael Barnhill, for Defendant-Appellee Mecklenburg County.*

STEPHENS, Judge.

This appeal stems from the fifth of five lawsuits initiated by Plaintiff Jerry Alan Reese between 31 May 2007 and 10 October 2008 against Mecklenburg County, North Carolina ("County") and various other entities regarding a plan to redevelop the City Center of Charlotte, North Carolina ("Plan"). Plaintiff appeals the trial court's order denying his motion to strike,<sup>1</sup> granting the County's motion for judgment on the pleadings, and granting Defendant Brooklyn Village, LLC's ("Brooklyn Village") motion to dismiss. For the reasons stated herein, we affirm the order of the trial court.

*I. Procedural History*

Plaintiff commenced this action against Defendants on 10 October 2008 by filing in the Superior Court of Mecklenburg County a "Motion to Commence Action by Issuance of Summons and Extension of Time to File Complaint." On 30 October 2008, Plaintiff filed a "Verified Complaint and Motion for Preliminary Injunction."

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1. Plaintiff moved to strike the defenses of *res judicata* and collateral estoppel from the County's and Brooklyn Village, LLC's answers and to strike the pleadings and dispositive rulings from *Reese I*, *Reese II*, and *Reese III*, which were attached as exhibits to the County's answer.

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Plaintiff has previously filed four similar actions in Mecklenburg County:

1. 07 CVS 9456—*Reese v. The Charlotte-Mecklenburg Board of Education and County of Mecklenburg, North Carolina* (“*Reese I*”).
2. 07 CVS 9577—*Reese v. The City of Charlotte and Mecklenburg County, North Carolina* (“*Reese II*”).
3. 08 CVS 01—*Reese v. Mecklenburg County, North Carolina; Mecklenburg County Public Facilities Corporation; 300 South Church Street, LLC; and R.B.C. Corporation* (“*Reese III*”).
4. 08 CVS 6584—*Reese v. Mecklenburg County, North Carolina; and Knights Baseball, LLC* (“*Reese IV*”).

*Reese I* and *II* were designated as exceptional under General Practice Rule 2.1 and assigned by the Honorable Sarah E. Parker, Chief Justice of the North Carolina Supreme Court, to the Honorable Lindsay Davis for disposition. Judge Davis dismissed both suits in one order on 12 October 2007, granting defendants’ motions for judgment on the pleadings. Plaintiff appealed to this Court. In separate opinions, this Court affirmed the trial court’s order. See *Reese v. Charlotte-Mecklenburg Bd. of Educ.*, 196 N.C. App. 539, 676 S.E.2d 481, disc. review denied, 363 N.C. 656, 685 S.E.2d 105 (2009) (“*Reese I*”); *Reese v. City of Charlotte*, 196 N.C. App. 557, 676 S.E.2d 493, disc. review denied, 363 N.C. 656, 685 S.E.2d 105 (2009) (“*Reese II*”).

*Reese III* and *IV* were also designated as exceptional and assigned by Chief Justice Parker to the Honorable W. David Lee for disposition. In *Reese III*, Judge Lee entered an order granting defendants’ motion for judgment on the pleadings and dismissing Plaintiff’s fifth claim for declaratory judgment and injunctive relief for lack of jurisdiction. In *Reese IV*, Judge Lee entered an order granting defendants’ motions for judgment on the pleadings. Plaintiff appealed to this Court, and this Court affirmed both orders. See *Reese v. Mecklenburg Cty.*, — N.C. App. —, 694 S.E.2d 453, disc. review denied, 364 N.C. 326, 700 S.E.2d 924 (2010) (“*Reese III*”); *Reese v. Mecklenburg Cty.*, — N.C. App. —, 685 S.E.2d 34 (2009), disc. review denied, 364 N.C. 242, 698 S.E.2d 653 (2010) (“*Reese IV*”).

On 3 December 2008, Plaintiff, the County, and Brooklyn Village filed a consent order for designation of the case *sub judice* as exceptional.

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On 18 December 2008, Chief Justice Parker designated this case as exceptional and assigned Judge Lee to preside over the proceedings.

On 2 January 2009, the County filed an answer to Plaintiff's complaint and asserted the defenses of, *inter alia*, *res judicata* and collateral estoppel. In support of these defenses, the County attached Plaintiff's complaints and the trial court's orders in *Reese I*, *Reese II*, and *Reese III*. On 2 January 2009, Brooklyn Village filed a motion to dismiss. On 20 January 2009, Brooklyn Village filed an answer and asserted the same defenses as the County.

On 16 March 2009, Plaintiff moved to strike numerous portions of both the County's and Brooklyn Village's answers, including the defenses of *res judicata* and collateral estoppel. Plaintiff argued that the defenses were "insufficient as a matter of law based upon the record before the Court." Following a hearing on 26 March 2009, Judge Lee entered an order on 21 May 2009 denying Plaintiff's motion to strike, granting the County's motion for judgment on the pleadings, and granting Brooklyn Village's motion to dismiss.

From the trial court's order, Plaintiff appeals.

*II. Factual Background*

In January 2007, the County entered into the Plan to redevelop Charlotte's ("City") City Center. Charlotte's City Center is divided into four quadrants by two intersecting streets, Trade Street and Tryon Street. These four quadrants are called "Wards." The Plan is designed "to achieve the specific government-related goals of development of an urban park, a mixed-use, residential-commercial community in Second Ward (Brooklyn Village), a baseball stadium in Third Ward, and sale of Spirit Square to fund infrastructure improvements for the baseball facility." *Reese II*, 196 N.C. App. at 563, 676 S.E.2d at 497. Under the Plan, the County acquired property in the City's Third Ward from an affiliate of Brooklyn Village upon which the County would develop an urban park. The County also agreed to lease land in the Third Ward to the Charlotte Knights Baseball Club upon which the club would build a baseball stadium. Furthermore, pursuant to the Plan, the County acquired two parcels of land, known as the Marshall Park Parcel and the Education Center Parcel (together, the "Second Ward Assemblage" or the "Property"), located in the Second Ward of the City. The Marshall Park and Education Center parcels are contiguous and contain approximately 11.34 acres of land. The County planned to develop an urban park on part of the Second Ward

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Assemblage and to convey the remaining portion of the land to Brooklyn Village to allow Brooklyn Village to develop a mixed-use development in the City Center.

The County acquired the Marshall Park Parcel from the City by deed dated 17 December 2007. By his action in *Reese I*, Plaintiff attempted to challenge and block this acquisition on the ground that the County did not have the authority to convey the Marshall Park Parcel to Brooklyn Village. The County acquired the Education Center Parcel from the Charlotte-Mecklenburg Board of Education (“Board”) by deed dated 13 December 2007. By his action in *Reese II*, Plaintiff attempted to challenge and block this acquisition on the ground that the County did not have the authority to convey the Education Center Parcel to Brooklyn Village.

On 18 December 2007, the Board adopted a Resolution Declaring Intent to Sell Property to Brooklyn Village (“Intent Resolution”). On 15 January 2008, the Board adopted a Resolution Authorizing the Sale of Property to Brooklyn Village (“Authorization Resolution”) whereby the Board authorized the sale of a portion of the Second Ward Assemblage to Brooklyn Village pursuant to the terms and conditions of a proposed Agreement for Sale of County Property between the County and Brooklyn Village (“Brooklyn Village Contract” or “Contract”). The County and Brooklyn Village entered into the Brooklyn Village Contract on 17 January 2008. As of the date of the filing of the complaint in this action, neither party to the Brooklyn Village Contract had performed under or revoked the contract.

Plaintiff brings this action pursuant to the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, *et seq.*, seeking judgment (1) declaring unlawful, nullifying, and setting aside the Brooklyn Village Contract, together with the Intent and Authorization Resolutions and (2) declaring Session Law 2000-65, as re-enacted and amended by Session Laws 2001-102, 2003-49, 2005-158, and 2007-33, unconstitutional on its face and as applied by the County in the disposition of the Property to Brooklyn.

*III. Discussion**A. Judgment on the Pleadings*

[1] Plaintiff first contends that the trial court erred in granting the County’s motion for judgment on the pleadings based on *res judicata* and collateral estoppel. We disagree.

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*1. Standard of Review*

Rule 12(c) of the North Carolina Rules of Civil Procedure provides that “[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” N.C. Gen. Stat. § 1A-1, Rule 12(c) (2009). The purpose of Rule 12(c) is “to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit.” *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). A court has “inherent power to render judgment on the pleadings where the facts shown and admitted by the pleadings entitle a party to such judgment.” *Erickson v. Starling*, 235 N.C. 643, 656, 71 S.E.2d 384, 393 (1952). In evaluating a Rule 12(c) motion, the court should grant the motion when a complaint does not allege “facts sufficient to state a cause of action or pleads facts which deny the right to any relief.” *Robertson v. Boyd*, 88 N.C. App. 437, 440, 363 S.E.2d 672, 675 (1988). A trial court’s grant of a motion for judgment on the pleadings is reviewed *de novo* on appeal. *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005).

*2. Res Judicata and Collateral Estoppel*

Under the doctrine of *res judicata* (or “claim preclusion”), “a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them.” *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). A prior judgment operates as an estoppel not only as to all matters actually determined or litigated in the proceeding, “but also as to all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination.” *Rodgers Bldrs., Inc. v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986). In order to successfully assert the doctrine of *res judicata*, a litigant must prove all of the following essential elements:

- (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits.

*Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 84, 609 S.E.2d 259, 262 (2005).

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Under the companion doctrine of collateral estoppel (or “issue preclusion”), “a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies.” *McInnis*, 318 N.C. at 428, 349 S.E.2d at 557. Whereas *res judicata* estops a party or its privy from bringing a subsequent action based on the “same claim” as that litigated in an earlier action, collateral estoppel precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim. *Hales v. North Carolina Ins. Guar. Ass’n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994). The two doctrines are complementary in that each may apply in situations where the other would not, and both advance the policy goals of “protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation.” *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993).

*a. Plaintiff’s Constitutional Claims for  
Due Process and Equal Protection*

By Plaintiff’s Fourth Claim for Relief, Plaintiff alleges that he and other parties “interested in submitting a proposal for the purchase and development of all or a portion of the Second Ward Assemblage had rights of due process and equal protection in the disposition process” and that “[t]he actions of Defendant County in purposefully and intentionally excluding Plaintiff and others similarly situated from participating in the process for the sale of the” Second Ward Assemblage violated Plaintiff’s rights of due process and equal protection.

In *Reese I*, Plaintiff’s Sixth Claim for Relief alleged that the County and the School Board violated Plaintiff’s due process and equal protection rights under the United States Constitution and under Article I, Section 19 of the North Carolina Constitution “in that neither Plaintiff nor others similarly situated were afforded a process by which they could submit a proposal for the purchase of the Education Center Property.”

In *Reese II*, Plaintiff’s Fifth Claim for relief alleged that the County and the City violated Plaintiff’s due process and equal protection rights under the U.S. Constitution and under Article I, Section 19 of the North Carolina Constitution “in that neither Plaintiff nor others similarly situated were afforded a process by which they could

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submit a proposal for the purchase and development of the Marshall Park Property.” Plaintiff alleged in both *Reese I* and *Reese II* that the County acquired the Education Center and Marshall Park Properties “to facilitate the conveyance of all or most of the property to Cornerstone/Spectrum for the Brooklyn Village project.”

In the order dismissing the claims in *Reese I* and *Reese II*, Judge Davis held that Plaintiff had not established a cognizable liberty or property interest in the Marshall Park or Education Center Properties that would give rise to a claim for either procedural or substantive due process, and that Plaintiff had failed to allege that he had been treated differently than others with whom he was similarly situated.<sup>2</sup> In separate opinions in *Reese I* and *Reese II*, this Court specifically addressed Plaintiff’s constitutional claims and, in affirming the dismissals, held that both the due process and equal protection claims were unfounded. *See Reese I*, 196 N.C. App. at 555, 676 S.E.2d at 492;<sup>3</sup> *Reese II*, 196 N.C. App. at 566, 676 S.E.2d at 499.<sup>4</sup>

In this case, Plaintiff’s Fourth Claim for Relief alleges that the County has violated his due process and equal protection rights under the U.S. Constitution and under Article I, Section 19 of the North Carolina Constitution based upon what he alleges is the County’s failure to permit him to submit a proposal for the purchase and development of all or a portion of the Second Ward Assemblage that the County is conveying to Brooklyn Village.

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2. We agree with the trial court’s finding herein that these legal and pleading deficiencies continue to exist in this case.

3. This Court explained:

We agree with the trial court that plaintiff complaint failed to allege anything more than a unilateral expectation of a property interest. Unilateral expectations are insufficient to demonstrate a property interest.

As to plaintiff’s claims of equal protection violations, these claims are grounded in his allegations that defendants abused their discretion in negotiating urban development. Having determined that those allegations were unfounded, we decline to address his equal protection claim.

*Reese I*, 196 N.C. App. at 555, 676 S.E.2d at 492 (internal citation omitted)

4. This Court explained:

In his fifth claim, plaintiff asserts that the actions of defendants violated his rights of due process and equal protection under the United States and North Carolina Constitutions. Specifically, plaintiff contends that he was deprived of his “privilege of contracting.” We disagree.

This same argument was raised and discussed as plaintiff’s Sixth Claim in our opinion in [*Reese I*]. For the reasons stated in that opinion, we hold that this argument is without merit.

*Reese II*, 196 N.C. App. at 566, 676 S.E.2d at 499.

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Plaintiff alleges specifically in his complaint:

92. On at least four (4) occasions, Plaintiff advised Defendant County . . . of his interest in proposing a purchase and land development plan for the Second Ward Assemblage.

93. . . . [O]ther parties were interested in submitting a proposal for the purchase and development of all or part of the Second Ward Assemblage.

94. As a group, all parties such as Plaintiff interested in submitting a proposal for the purchase and development of all or a portion of the Second Ward Assemblage had rights of due process and equal protection in the disposition process as guaranteed by the United States Constitution and Article I, Section 19 of the Constitution of North Carolina.

Based upon a comparison of the claims in *Reese I* and *Reese II* with the claims in this case, it is evident that Plaintiff seeks to relitigate the same constitutional claims arising out of the same property transactions which were dismissed by Judge Davis' order. This he is plainly precluded by longstanding legal precedent from pursuing.

Plaintiff contends, however, that his argument in the present case is different from his claims in *Reese I* and *Reese II* because now he is attacking the County's *disposition* of the Second Ward Assemblage whereas in *Reese I* and *II* he was challenging the County's *acquisition* of the property. This is indisputably a distinction without a difference. Plaintiff is ultimately claiming a property interest in the Marshall Park and Education Center Properties and contesting the same land exchange, use, and purchase plan that is intended to further City and County economic development, urban revitalization, community development, and land use plans. Such plan, Plaintiff acknowledges, included the County's acquisition of the Education Center and Marshall Park Properties "to facilitate the conveyance of all or most of the property to Cornerstone/Spectrum for the Brooklyn Village project."

Accordingly, as Plaintiff's claims for due process and equal protection violations under the U.S. Constitution and Article I, Section 19 of the North Carolina Constitution have been previously litigated between Plaintiff and the County, and a final decision on the merits dismissing these claims has been entered, these claims are barred by the principles of *res judicata*.

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Plaintiff's argument is overruled.

*b. The Contract Between the  
County and Brooklyn Village*

Plaintiff next asserts that the Brooklyn Village Contract is null, void, and of no legal effect because the County had no valid authority to enter into the Contract and because the “grossly inadequate net purchase price” established for the sale of the Property constitutes a manifest abuse of discretion by the County and the Board.

As noted, *supra*, under the doctrine of *res judicata*, a judgment operates as an estoppel not only as to all matters actually determined or litigated in the proceeding, “but also as to all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination.” *Rodgers Bldrs.*, 76 N.C. App. at 22, 331 S.E.2d at 730. “A party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery; thus, a party will not be permitted, except in special circumstances, to reopen the subject of the arbitration or litigation with respect to matters which might have been brought forward in the previous proceeding.” *Id.* at 23, 331 S.E.2d at 730.

*Reese III* was commenced on 2 January 2008, 10 months before Plaintiff filed the complaint in the present action, with the filing of a “Motion to Commence Action by Issuance of Summons and Extension of Time to File Complaint” under N.C. Gen. Stat. § 1A-1, Rule 3. This Rule 3 Motion was attached as Exhibit 10 to the County’s Answer in the case *sub judice*. In his Rule 3 Motion, Plaintiff alleged that he required an extension of time within which to file his summons and complaint for the purpose of filing the following claims:

5. To seek a declaratory judgment declaring unlawful, nullifying and setting aside that certain Resolution Declaring Intent to Sell Property to Brooklyn Village, LLC adopted by the Mecklenburg County Board of Commissioners on December 18, 2007 (the “Brooklyn Village Resolution”);<sup>[5]</sup>
6. To seek a declaratory judgment declaring unlawful, nullifying and setting aside that certain Agreement of Sale for County

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5. The “Brooklyn Village Resolution” is referred to by Plaintiff in this case as the “Intent Resolution.”

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Property<sup>[6]</sup> by and between Mecklenburg County and Brooklyn Village, LLC signed by Brooklyn Village, LLC on December 6, 2007, attached to and made a part of the Brooklyn Village Resolution[.]

On 22 January 2008, Plaintiff filed his complaint in *Reese III* pursuant to his earlier Rule 3 Motion. In this complaint, Plaintiff specifically alleged:

20. On January 15, 2008, the Board [of County Commissioners of Mecklenburg County (“Board”)] also adopted that certain Resolution Authorizing the Sale of Property to Brooklyn Village, LLC,<sup>[7]</sup> whereby the Board authorized the sale of certain public property located in the Second Ward area of Charlotte, North Carolina, pursuant to the terms and conditions of that certain Agreement of Sale for County Property between Defendant County and Brooklyn Village, LLC, a draft of which was included as an attachment for Item 21 of the January 15, 2008, Regular Meeting Agenda of the Board (hereafter referred to as the “Brooklyn Village Contract”).<sup>[8]</sup>

21. Upon information and belief, the Assemblage Contract<sup>[9]</sup> and the Brooklyn Village Contract are inter-related and the consummation of the Assemblage Contract is a material consideration for the performance by Brooklyn Village, LLC of its obligations under the Brooklyn Village Contract.

Additionally, in language nearly identical to allegations made in *Reese I*, Plaintiff further alleged in his complaint in *Reese III*:

70. . . . [T]he Education Center was conveyed to Defendant County by [the Charlotte-Mecklenburg Board of Education (“CMS”)] pursuant to the terms and conditions of that certain

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6. The “Agreement of Sale for County Property” is referred to by Plaintiff in this case as the “Contract.”

7. The “Resolution Authorizing the Sale of Property to Brooklyn Village, LLC” is referred to by Plaintiff in this case as the “Authorization Resolution.”

8. The “Brooklyn Village Contract” is referred to by Plaintiff in this case as the “Contract.”

9. In *Reese III*, the “Assemblage Contract” was entered into by Defendant County and Defendant 300 South Church Street whereby the County would purchase property located in the Third Ward, referred to as the “Assemblage,” from 300 South Church Street.

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Land Swap Interlocal Agreement between Defendant County and [CMS], dated on or around May 30, 2007, as amended.

71. Section 2.01(a) of the aforementioned Land Swap Interlocal Agreement provides that the conveyance of the Education Center property is need[ed] “*for an exchange with Cornerstone Real Estate Advisors . . . [.]*” Upon information and belief, the acquisition of the Education Center property by the County is not for public use by the County, but rather solely to assemble land for a private development to be known as Brooklyn Village.

Despite these allegations and Plaintiff’s recitation in his Rule 3 Motion that he would be challenging the contracts and resolutions relating to the Brooklyn Village Contract, Plaintiff made no claims in *Reese III* contesting the validity of that Brooklyn Contract or the actions of the County in entering into the Contract. Instead, Plaintiff confined his challenges to the validity of the contract and resolutions concerning the County’s acquisition of the “Assemblage” and the actions of the County in entering into those contracts.

Following the dismissal of *Reese III*, Plaintiff initiated this action attacking the Brooklyn Village Contract and the County’s actions in entering into the Contract. In language almost identical to that used in Plaintiff’s Complaint in *Reese III*, Plaintiff alleges in the present complaint:

15. On January 15, 2008, the Board also adopted that certain Resolution Authorizing the Sale of Property to Brooklyn Village, LLC, whereby the Board authorized the sale of certain real property pursuant to the terms and conditions of that certain Agreement for Sale of County Property between Defendant County and Brooklyn Village, LLC (hereinafter referred to as the “Contract”), a draft of which was included as an attachment for Item 21 of the January 15, 2008, Regular Meeting Agenda of the Board. This Resolution is hereafter referred to in this Complaint as the “Authorization Resolution.”

Moreover, in language almost identical to that used in Plaintiff’s Rule 3 Motion in *Reese III*, Plaintiff requests the following relief in this case:

1. The Court enter a declaratory judgment declaring unlawful, nullifying and setting aside that certain Resolution Declaring

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Intent to Sell Property to Brooklyn Village, LLC adopted by the Mecklenburg County Board of County Commissioners on December 18, 2008.

....

3. The Court enter a declaratory judgment declaring unlawful, nullifying and setting aside that certain Agreement of Sale for County Property between Defendant County and Brooklyn Village, LLC effective January 17, 2008, relating to the Property described in this Complaint.

At the 26 March 2009 hearing, Plaintiff acknowledged that in his Rule 3 motion, he stated that he would be “seeking declaratory judgment setting aside the Brooklyn Village resolution of December 18th,” and “seek[ing] a declaratory judgment setting aside the agreement which had been signed by Brooklyn Village but not yet signed by the [C]ounty.” However, Plaintiff informed the trial court that he “chose not to” bring forth these claims in *Reese III*, explaining, “[t]hat was my election, and under *Bockweg* I had that election that I could make and chose to make it . . . .”

In *Bockweg*, our Supreme Court stated:

the common law rule against claim-splitting is based on the principle that all damages incurred as the result of a single wrong must be recovered in one lawsuit. Where a plaintiff has suffered multiple wrongs at the hands of a defendant, a plaintiff may normally bring successive actions or, at his option, may join several claims together in one lawsuit.

*Bockweg*, 333 N.C. at 492, 428 S.E.2d at 161 (internal citations omitted).

As alleged by Plaintiff in his complaint in *Reese III*, the Brooklyn Village Contract concerning the Second Ward property was “inter-related” with the Assemblage Contract concerning the Third Ward property which Plaintiff challenged in *Reese III*. Moreover, as Plaintiff alleged in *Reese III*, the acquisition of the Third Ward property, the subject of the Assemblage Contract, was a material consideration for the conveyance of the Second Ward property, the subject of the Brooklyn Village Contract, to Brooklyn Village. As both conveyances are necessary for the challenged land “swap” to occur, the contracts and the County’s actions in entering into them were a “single wrong” and, under *Bockweg*, any damages as a result of that wrong must be recovered in one lawsuit. *Id.*

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Plaintiff also argues that “[i]t defies ‘logic and common sense’ to require Plaintiff to fully develop the facts and legal theories to a claim which has ripened into a justiciable controversy only five (5) days prior to the filing of the *Reese III* Complaint.” However, since the filing of his first lawsuit on 31 May 2007, challenging actions by the School Board that he alleged had occurred on 30 May 2007, Plaintiff has repeatedly asserted that the property which the County acquired in the Second Ward from the City and the Board was to be used in a “swap” with Brooklyn Village for property in the Third Ward. Thus, at the time Plaintiff filed his complaint in *Reese III*, the claims concerning the validity of the Brooklyn Village Contract, and the actions of the County in entering into it, were known to Plaintiff and were available to be raised.

The claims concerning the validity of the Brooklyn Village Contract outlined in the Rule 3 Motion, and referred to in paragraphs 20 and 21 of the complaint in *Reese III*, are now the subject of Plaintiff’s first, second, third, and sixth<sup>10</sup> claims for relief, and the portion of Plaintiff’s fourth claim for relief in which he alleged that the County’s failure to follow procedures which he claims exist for the private disposition of land by the County has amounted to a constitutional violation.

Plaintiff had actual knowledge of the issues concerning the validity of the Brooklyn Village Contract, and the County’s actions entering into it, at the time he filed his complaint in *Reese III*. Moreover, Plaintiff represented to a judicial official in seeking an order extending time that he would raise these issues in *Reese III*. We conclude that Plaintiff should have raised the issues concerning the validity of the Brooklyn Village Contract, and the County’s actions in entering into it, not later than *Reese III*. Accordingly, Plaintiff is now barred from doing so. Judge Lee correctly ruled that the *res judicata* and claim-splitting principles of our law require dismissal of these claims against the County.

*c. Session Law 2007-33<sup>11</sup>*

Plaintiff next contends that Session Law 2007-33 is unconstitutional. Specifically, Plaintiff claims that Session Law 2007-33 is unconstitutional “on its face” because it contains no procedures similar to N.C.

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10. There is no fifth claim for relief and Plaintiff has apparently identified his fifth claim as his sixth claim for relief.

11. Session Law 2000-65, as reenacted by Session Law 2003-49, as rewritten by Session Law 2005-158, and as reenacted by Session Law 2007-33 pertains to the disposition by negotiated sale of specific property in the County.

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Gen. Stat. § 160A-266 to “safeguard the constitutional rights of parties interested in the purchase of public lands” or for “identifying and selecting the party to the negotiated private sale[,]” thus inviting “arbitrary conduct[.]” Plaintiff further claims that Session Law 2007-33 is unconstitutional “as applied” by the County in entering into the Brooklyn Village Contract because the law was applied “in such a manner as to intentionally and purposefully exclude Plaintiff from participating in the disposition process[.]”

Pursuant to N.C. Gen. Stat. § 160A-266,

(a) Subject to the limitations prescribed in subsection (b) of this section, and according to the procedures prescribed in this Article, a city may dispose of real or personal property belonging to the city by:

- (1) Private negotiation and sale;
- (2) Advertisement for sealed bids;
- (3) Negotiated offer, advertisement, and upset bid;
- (4) Public auction; or
- (5) Exchange.

N.C. Gen. Stat. § 160A-266(a) (2009).<sup>12</sup> The limitations of subsection (b) include that real property generally may not be disposed of by private negotiation and sale. N.C. Gen. Stat. § 160A-266(b) (2009). However, Session Law 2007-33 grants the County the right to dispose of real property pursuant to a private sale “[w]hen the board of commissioners determines that a sale or disposition of property will advance or further any county or municipality-adopted economic development, transportation, urban revitalization, community development, or land-use plan or policy,” and upon compliance with notice requirements and adoption of an authorizing resolution. See Session Laws 2000-65, 2003-49, 2005-158, and 2007-33 (the latter adopted 30 April 2007).

In *Reese I* and *Reese II*, Plaintiff challenged the actions of the County in the acquisition and proposed disposition of the Education Center and Marshall Park Properties, both of which are the subject of the Brooklyn Village Contract. Plaintiff argued that the sole reason the County was seeking to acquire the Properties was to

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12. Pursuant to N.C. Gen. Stat. § 153A-176, the provisions of N.C. Gen. Stat. § 160A-266 apply to counties.

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participate in a property exchange with Cornerstone/Spectrum and that the County, “absent special legislation,” could not dispose of the Property by such privately negotiated sale pursuant to N.C. Gen. Stat. § 160A-266.

In response, the County tendered Session Law 2007-33, establishing its right to dispose of property in a privately negotiated sale. In his order dismissing Plaintiff’s claims in *Reese I* and *Reese II*, Judge Davis noted that Plaintiff appeared to allege that the contemplated transfer of the Education Center and Marshall Park Properties to Cornerstone/Spectrum must comply with N.C. Gen. Stat. § 160A-266, which prohibits the County’s disposition of real property by private negotiation and sale. However, Judge Davis explained that Plaintiff had “ignored” Session Laws 2000-65, 2003-49, 2005-158, and 2007-33 “which provide the County with authority to dispose of real property by private sale or disposition[.]” In this Court’s opinion in *Reese II*, we noted that “Session Laws 2000-65 and 2007-33 specifically amended N.C. Gen. Stat. § 160[A]-266 as it applied to Mecklenburg County to authorize private sales” of real property and, thus, the contemplated land transfers did not violate N.C. Gen. Stat. § 160A-266. *Reese II*, 196 N.C. App. at 565, 676 S.E.2d at 498.

It is beyond reasonable debate that the operation of Session Law 2007-33 and its effect on Plaintiff’s claims was at issue in *Reese I* and *Reese II* and that Session Law 2007-33 was part of the basis upon which Judge Davis denied Plaintiff’s claims, which this Court affirmed. Under these circumstances, had Plaintiff desired to challenge the constitutionality of Session Law 2007-33 in connection with the acquisition and disposition of the Education Center Property or the Marshall Park Property, Plaintiff should have done so in *Reese I* and *Reese II* rather than delaying his challenge to that law or its use in the challenged transactions until the present suit. Accordingly, Plaintiff’s argument is barred by the principles of *res judicata*, and the trial court did not err in dismissing Plaintiff’s claim on that basis.

Nonetheless, Plaintiff argues that at the time he filed *Reese I* and *Reese II*, he could not have challenged the constitutionality of Session Law 2007-33 since the law governs the disposition of property and at the time of *Reese I* and *Reese II*, the County did not yet own the Property. Such argument is misguided.

“[I]n order for a court to have subject matter jurisdiction to render a declaratory judgment, an actual controversy must exist between the parties at the time the pleading requesting declaratory

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relief is filed.” *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986). “[I]n order ‘to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable[.]’” *Id.* (*quoting Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984)). Thus,

[t]he imminence and practical certainty of the act or event in issue, or the intent, capacity, and power to perform, create justiciability as clearly as the completed act or event, and is generally easily distinguishable from remote, contingent, and uncertain events that may never happen and upon which it would be improper to pass as operative facts.

*Id.* at 590, 347 S.E.2d at 32 (emphasis omitted).

In *Sharpe*, former newspaper owners contested the legality of a non-compete agreement with the new newspaper owner. Our Supreme Court found that no justiciable controversy existed because the former newspaper owners merely intended to compete with the newspaper business some day and did not have any specific plans to directly or indirectly compete. Unlike in *Sharpe*, at the time of *Reese I* and *Reese II*, the County and Cornerstone had a specific and documented Memorandum of Understanding for the disposition of the Property, which defined the land exchanges and the development of Brooklyn Village and an urban park. Additionally, the City and the Board of Education in the Interlocal Cooperation Agreement at issue in *Reese I* and *Reese II* specifically granted the County possession of the Property for the sole purpose of Cornerstone’s developing the land into Brooklyn Village. Furthermore, this Court in *Reese II* specifically addressed Session Law 2000-65, as amended, in holding that the land trade agreement between the City and the County was lawful. *Reese II*, 196 N.C. App. at 565, 676 S.E.2d at 498. Thus, contrary to Plaintiff’s assertion, the constitutionality of Session Laws 2000-65 and 2007-33 was justiciable at the time of *Reese I* and *Reese II*.

Plaintiff’s argument is overruled.

*B. Plaintiff’s Motions to Strike*

**[2]** In light of our holdings above, we further hold that the trial court did not err in denying Plaintiff’s motion to strike the County’s defenses of *res judicata* and collateral estoppel and in denying Plaintiff’s motion to strike the pleadings and dispositive rulings from *Reese I*, *Reese II*, and *Reese III* which were attached as exhibits to the County’s answer.

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Rule 12(f) of the North Carolina Rules of Civil Procedure allows the court to strike “from any pleadings any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter.” N.C. Gen. Stat. § 1A-1, Rule 12(f) (2009). Rule 12(f) motions are “addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of discretion.” *Carpenter v. Carpenter*, 189 N.C. App. 755, 759, 659 S.E.2d 762, 765 (2008) (citation and quotation marks omitted). “Matter should not be stricken unless it has no possible bearing upon the litigation. If there is any question as to whether an issue may arise, the motion [to strike] should be denied.” *Id.* at 759, 659 S.E.2d at 766 (citation and quotation marks omitted).

Here, as the County’s *res judicata* and collateral estoppel defenses are determinative of the issues decided above, it is axiomatic that they are not “insufficient” defenses which should have been stricken by the trial court. Moreover, as the pleadings from *Reese I*, *Reese II*, and *Reese III*, and the dispositive orders in those cases, are necessary to a proper determination of the scope of prior litigation between the parties within the context of the *res judicata* and collateral estoppel defenses, those materials are not redundant, irrelevant, immaterial, impertinent, or scandalous matter which should have been stricken by the trial court. Accordingly, we conclude that the trial court did not abuse its discretion in denying Plaintiff’s motions to strike.

*C. Motion to Dismiss*

[3] Plaintiff finally argues that the trial court erred in granting Brooklyn Village’s motion to dismiss. We disagree.

“On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted.” *Allred v. Capital Area Soccer League, Inc.*, 194 N.C. App. 280, 282, 669 S.E.2d 777, 778 (2008) (citation and quotation marks omitted). “Under Rule 12(b)(6), a claim should be dismissed where it appears that plaintiff is not entitled to relief under any set of facts which could be proven.” *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 299, 435 S.E.2d 537, 541 (1993), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1994). “This occurs where there is a lack of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim.” *Id.* “This Court must conduct a *de novo* review of the pleadings to deter-

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mine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Craven v. SEIU COPE*, 188 N.C. App. 814, 816, 656 S.E.2d 729, 732 (2008) (citation and quotation marks omitted).

In this case, as Session Law 2000-65 modified by Session Law 2007-33 remains valid, the Intent Resolution and Authorization Resolution between the County and Brooklyn Village are lawful and enforceable. As the agreements are lawful, Plaintiff's claims against Brooklyn Village stating otherwise are claims for which no relief can be granted under any legal theory. The trial court thus properly granted Brooklyn Village's motion to dismiss.

For the foregoing reasons, the order of the trial court, in its entirety, is

AFFIRMED.

Judges HUNTER, ROBERT C. and GEER concur.



STATE OF NORTH CAROLINA v. JERRY JUNIOR McNEIL

No. COA10-456

(Filed 1 March 2011)

**1. Larceny— felony larceny—fatally defective indictment—failure to allege ownership of handgun**

The trial court erred by entering judgment for felony larceny. The indictment was fatally defective because it failed to allege ownership of the 9 mm handgun.

**2. Identification of Defendants— motion to dismiss—sufficiency of evidence—perpetrator of crime**

The trial court did not err by denying defendant's motion to dismiss the charge of felonious breaking or entering based on alleged insufficient evidence that defendant was the perpetrator of the crime. The victim recognized defendant from a distance at the scene of the crime because she was familiar with him, and law enforcement was able to identify defendant's automobile.

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**3. Firearms and Other Weapons—possession of firearm by felon—motion to dismiss—sufficiency of evidence—constructive possession of gun**

The trial court did not err by denying defendant's motion to dismiss the charge of possession of a firearm by a felon even though defendant contended there was insufficient evidence that he had possession of a gun found in a clothes hamper. Defendant had a specific connection to the place where the gun was found, he behaved suspiciously, and he was aware of the gun's presence at the victim's home. Further, the State's evidence of other incriminating circumstances established that defendant constructively possessed the gun.

**4. Constitutional Law—right to fair trial—due process—trial court's comments about defendant's absence from courtroom**

Defendant was not deprived of a fair trial and due process in a felonious breaking or entering, felonious larceny, and possession of a firearm by a felon case even though defendant contended the trial court made improper comments about his absence from the courtroom. In light of the circumstances in which the comment was made, the trial court merely explained defendant's absence for the record. Even assuming *arguendo* that there was error, defendant failed to show that the jury would have reached a different result.

**5. Damages and Remedies—restitution—sufficiency of evidence—amount of award**

The trial court erred in a felonious breaking or entering, felonious larceny, and possession of a firearm by a felon case by ordering defendant to pay \$217.40 in restitution because the State failed to present evidence supporting the amount of the award.

Appeal by defendant from judgments entered 1 December 2009 by Judge W. Allen Cobb, Jr., in Sampson County Superior Court. Heard in the Court of Appeals 13 October 2010.

*Attorney General Roy Cooper, by Special Deputy Attorney General Anne J. Brown, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender S. Hannah Demeritt, for defendant-appellant.*

CALABRIA, Judge.

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Jerry Junior McNeil (“defendant”) appeals judgments entered upon jury verdicts finding him guilty of felonious breaking or entering, felonious larceny, and possession of a firearm by a felon. We arrest judgment for defendant’s conviction for felonious larceny, find no error in defendant’s convictions for felonious breaking or entering and possession of a firearm by a felon, and vacate the trial court’s judgment requiring defendant to pay restitution and remand for redetermination.

**I. BACKGROUND**

At 11:00 a.m. on 29 November 2007, Katrina Carroll (“Carroll”) heard “loud banging and crashing” at the back door of the home she shared with Gary Willis (“Willis”) at 205 Carolina Avenue in Clinton, North Carolina. The person who made the noise was a man. Since the man was entering the back door of her home without permission, Carroll rushed to the front door to exit her home. She also observed that the man, later identified as defendant, had a dreadlock hairstyle and wore a yellow toboggan with a black stripe.

After Carroll successfully exited her home, she met an elderly couple (“the couple”) who offered her a ride in their vehicle. The couple then drove Carroll to a neighbor’s home and parked in the driveway located approximately 15 to 20 feet from Carroll’s driveway. There Carroll observed a gold automobile (“the automobile”) parked in her driveway. As the automobile backed out of Carroll’s driveway, she observed three men in the automobile. The man sitting in the back seat, subsequently identified as defendant, had a dreadlock hairstyle and wore a yellow toboggan with a black stripe. The man sitting in the back seat was the same man who entered Carroll’s back door as she exited her home. As the automobile slowly backed out of the driveway, Carroll had enough time to record the numbers on the automobile’s license plate.

At 11:14 a.m., Carroll contacted the Clinton Police Department (“CPD”), reported what happened at her home, and gave Detective Dameon Parker (“Detective Parker”) the numbers from the license plate of the automobile that backed out of her driveway. Detective Parker found that the automobile was registered to defendant. When Detective Parker arrived at Carroll’s home five minutes later, he discovered that the back door was “busted in,” “splinters of wood” were on the floor, and the “lock had been kicked in.” During the investigation, Detective Parker asked Carroll if anything was missing from her home. She told him that Willis kept a 9 mm handgun (“the

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gun") in the nightstand beside her bed in the master bedroom and it was missing. Detective Parker then entered the master bedroom, noticed that the nightstand's drawer had been opened, and observed that the gun was not in the drawer. Neither Carroll nor Willis had given anyone permission to enter their home or to take the gun. Carroll and Willis then provided the serial number of the handgun to Detective Parker.

Shortly after the incident at the Carroll/Willis residence, at 11:30 a.m. on 29 November 2007, Esther Bass ("Bass") heard a knock at the back door of her home at 220 West Carter Street in Clinton, North Carolina. Bass' daughter, who formerly dated defendant, opened the door for defendant and two other men (collectively, "the three men"). After the three men entered Bass' home, Bass' daughter warned them that law enforcement officers were "around the house." Bass observed the three men as they walked through her dining room and exited through her front door.

Officer Willie Bowden ("Officer Bowden") and Detective Grady (collectively, "the officers") of the CPD were the officers who responded to a call and arrived at Bass' home. During Officer Bowden's investigation, he observed a gold automobile parked in the driveway. He also observed "three to four" men, including defendant, standing on the front porch of Bass' home.

Bass gave the officers permission to search her home. Since the officers learned that defendant entered the home through the back door, they searched the area surrounding the back door. The laundry area was an area next to the back door. Detective Grady found a 9 mm handgun inside a clothes hamper located in the laundry area. When the serial number on the gun found in the clothes hamper was checked, it matched the serial number of the gun that was missing from Carroll's home.

Defendant was arrested and indicted for felonious breaking and entering, felonious larceny pursuant to breaking and entering, possession of stolen goods, and possession of a firearm by a convicted felon. Although defendant was also indicted for attaining the status of an habitual felon, the trial court later dismissed this indictment.

The case was heard before the 15 June 2009 criminal session of Sampson County Superior Court. On the first day of the trial, the trial court ordered defendant to return to the courtroom no later than 2:00 p.m. following lunch recess. However, defendant failed to appear for

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trial following the recess. The trial did not resume until 3:08 p.m. that day. According to the transcript, defendant never returned to court. Defendant's counsel moved to dismiss all charges at the close of the State's evidence, and the trial court denied the motion. Defendant did not present evidence. The jury returned verdicts finding defendant guilty of felonious breaking or entering, felonious larceny, possession of stolen goods, and possession of a firearm by a felon.

The trial court sentenced defendant to minimum terms of 11 months to maximum terms of 14 months on the charges of felonious larceny and felonious breaking or entering. On the charge of possession of a firearm by a convicted felon, the trial court sentenced defendant to a minimum term of 19 months to a maximum term of 23 months.<sup>1</sup> The trial court ordered defendant to serve all sentences consecutively in the custody of the North Carolina Department of Correction, and also ordered defendant to pay \$217.40 as restitution to Willis for the damage to the door. Defendant appeals.

**II. INDICTMENT FOR FELONIOUS LARCENY**

[1] Defendant argues that the trial court erred in entering judgment for felonious larceny because the indictment, which failed to allege ownership of the 9 mm handgun, was fatally defective. We agree.

An indictment must allege "facts supporting every element of [the charged] criminal offense . . . with sufficient precision to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2009). We review the sufficiency of an indictment *de novo*. *State v. McKoy*, — N.C. App. —, —, 675 S.E.2d 406, 409 (2009). A defective indictment deprives the trial court of jurisdiction. *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 209 (2001). An indictment is invalid and prevents the trial court from acquiring jurisdiction over the charged offense if "fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998). An essential element of larceny is that the defendant "took the property of another." *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982), *overruled on other grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010). "An indictment for larceny which fails to allege the ownership of the property . . . is

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1. The trial court arrested judgment on the charge of possession of stolen goods "because by operation of law those are inconsistent verdicts" with defendant's convictions for felonious breaking and entering and felonious larceny.

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fatally defective." *State v. Cathey*, 162 N.C. App. 350, 352-53, 590 S.E.2d 408, 410 (2004).

In the instant case, defendant's indictment for felonious larceny alleged:

And the jurors for the State upon their oath present that on or about the date of the offense shown [29 November 2007] and in Sampson County the defendant named above unlawfully, willfully, and feloniously did steal, take and carry away a 9mm handgun, pursuant to a violation of section 14-54(a) of the General Statutes of North Carolina.

The indictment failed to allege ownership of the 9 mm handgun. The State concedes that the indictment fails to allege ownership of the handgun, and is therefore fatally defective. We agree. Since the indictment for felonious larceny is fatally defective because it failed to allege ownership of the gun, it is insufficient to confer jurisdiction, and this Court arrests the judgment. *State v. McKoy*, 265 N.C. 380, 381, 144 S.E.2d 46, 48 (1965).

**III. MOTION TO DISMISS**

[2] Defendant argues that the trial court erred by denying his motion to dismiss the charges of felonious breaking or entering and possession of a firearm by a felon. Defendant claims the State failed to present substantial evidence that he was the perpetrator who entered Carroll's house, stole a gun, and also that he possessed a gun. We disagree.

"This Court reviews a trial court's denial of a motion to dismiss criminal charges *de novo*, to determine 'whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense.' " *State v. Davis*, — N.C. App. —, —, 678 S.E.2d 385, 388 (2009) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)), *affirmed in part, reversed in part on other grounds, and remanded*, 364 N.C. 297, 698 S.E.2d 65 (2010). "Substantial evidence is evidence that a reasonable mind might find adequate to support a conclusion." *State v. Hargrave*, — N.C. App. —, —, 680 S.E.2d 254, 261 (2009). "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom[.]" *Powell*, 299 N.C. at 99, 261 S.E.2d at 117.

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“[C]ontradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve[.]” *State v. Prush*, 185 N.C. App. 472, 478, 648 S.E.2d 556, 560 (2007). “The test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both.” *Powell*, 299 N.C. at 99, 261 S.E.2d at 117.

When the motion . . . calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant’s guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.

*State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965). “If a jury could reasonably infer defendant’s guilt when the evidence is viewed in the light most favorable to the State, then the motion must be denied.” *State v. Hines*, 166 N.C. App. 202, 204, 600 S.E.2d 891, 894 (2004).

**A. Felonious Breaking or Entering**

Defendant does not dispute that a breaking and entering occurred at Carroll’s home.<sup>2</sup> Instead, he contends that the State did not present substantial evidence that he was the perpetrator of the offense. We disagree.

As an initial matter, we note that the trial court did not instruct the jury on acting in concert or aiding and abetting. Therefore, in order for the jury to find defendant guilty of felonious breaking or entering, “the State was required to prove that defendant committed the offenses himself.” *State v. Haymond*, — N.C. App. —, —, 691 S.E.2d 108, 122 (2010).

In *State v. Ethridge*, the defendant argued on appeal that the trial court erred by denying his motion to dismiss the charges of, *inter alia*, felonious breaking and entering at the close of all of the evidence “because ‘the evidence was insufficient to prove the Defendant was the perpetrator . . . .’” 168 N.C. App. 359, 362, 607 S.E.2d 325, 327 (2005). This Court disagreed, holding that the State

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1. The essential elements of felonious breaking and entering are that the defendant: (1) broke or entered; (2) a building, including a dwelling; (3) with the intent to commit any felony or larceny therein. *State v. White*, 84 N.C. App. 299, 301, 352 S.E.2d 261, 262 (1987).

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presented substantial evidence that the defendant was the perpetrator, including the fact that a vehicle registered to the defendant “was seen at the crime scene . . . [and] was pulled up to the door of the house” on the day the offense occurred. *Id.*

In the instant case, Carroll heard “loud banging and crashing” at the back door of her home. She then observed a man, later identified as defendant, enter her home through the back door. The man had a dreadlock hairstyle and wore a yellow toboggan with a black stripe. Carroll observed only one man enter her home as she fled. When she sat in her neighbor’s driveway observing her home, she saw a gold automobile parked in her driveway. While she waited and watched at a distance of approximately 15 to 20 feet away, she “very clearly” observed the automobile leaving her driveway and a man sitting in the back seat. The man had a dreadlock hairstyle and wore a yellow toboggan with a black stripe. Carroll recognized him as the same man she had previously observed entering the back door of her home.

Detective Parker arrived at Carroll’s home and observed that “[n]othing in the house seemed to be disturbed.” When he asked Carroll if anything was missing, the only item Carroll mentioned was “a handgun [that] was missing from the nightstand beside her bed.” Carroll then showed Detective Parker the empty nightstand drawer where she kept the gun.

Carroll was able to recognize defendant from a distance because she was familiar with him. Carroll and defendant had interacted on five previous occasions. The first time was two months prior to the day defendant entered Carroll’s home through the back door. On this occasion, Carroll allowed a friend to call defendant and invite him to Carroll’s home so that Carroll and her friend could buy drugs from him. Defendant was with the friend in the master bedroom of Carroll’s home for approximately 20 minutes attempting to sell drugs to them. On another recent occasion, defendant met Carroll at a convenience store attempting to sell drugs to her. On a third occasion, Carroll contacted defendant. She asked him to sell her some drugs on credit. She also asked him if she could use the gun as collateral until she could pay him with currency. Defendant agreed. He arrived at Carroll’s home, gave Carroll the drugs, and took possession of the gun. On the fourth occasion, Carroll attempted to give defendant the money she owed him and asked him to return the gun. Defendant refused to return the gun unless Carroll paid him more money. After Carroll told Willis, she and Willis met with defendant. When Carroll

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and Willis gave defendant the extra money, defendant returned the gun. This meeting of Carroll, Willis, and defendant was the fifth time Carroll interacted with defendant.

In addition to Carroll's ability to identify defendant, law enforcement was able to identify defendant's automobile. Carroll observed and recorded the license plate numbers on an automobile parked in her driveway. Detective Parker found that the automobile was registered to defendant. When an automobile registered to a defendant is found at a crime scene, along with evidence that the victim observed a man matching the defendant's description flee the scene, these facts show that defendant "was seen at the crime scene" and "was pulled up to the door of the house" on the day the offense occurred. *See, e.g., People v. Webster*, 136 Cal. App. 2d 44, 288 P.2d 142 (1955) (court found no error in a defendant's conviction for burglary because, *inter alia*, a man answering the defendant's description fled when discovered in the victim's home, and that shortly thereafter a man drove away in an automobile which the defendant had borrowed and which had been parked near such home); *People v. Beal*, 108 Cal. App. 2d 200, 239 P.2d 84 (1951) (The defendant was sufficiently identified with a robbery where witnesses testified that they saw him at the scene of the crime at the time of its commission, the get-away automobile was registered in his name, and money of the same kind and denomination as that stolen was found in his companion's possession at the time of his arrest.).

From the facts in the instant case, a reasonable inference of defendant's guilt may be drawn. We hold that the evidence presented at trial, viewed in the light most favorable to the State, was substantial evidence for the jury to decide whether the facts, taken singly or in combination, satisfied it beyond a reasonable doubt and allowed a reasonable juror to conclude that defendant was the perpetrator of the felonious breaking or entering of Carroll's home. Therefore, the trial court properly denied defendant's motion to dismiss. Defendant's issue on appeal is overruled.

**B. Possession of a Firearm by a Felon**

[3] In the instant case, defendant does not challenge his status as a convicted felon or that the State failed to prove he was a convicted felon. Instead, defendant argues that the State failed to present substantial evidence that he had possession of the gun found in the clothes hamper. We disagree.

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N.C. Gen. Stat. § 14-415.1(a) (2009) prohibits “any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c).” “[T]he State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm.” *State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686 (2007).

Possession of a firearm may be actual or constructive. *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). Actual possession requires that the defendant have physical or personal custody of the firearm. *Id.* In contrast, the defendant has constructive possession of the firearm when the weapon is not in the defendant’s physical custody, but the defendant is aware of its presence and has both the power and intent to control its disposition or use. *Id.* When the defendant does not have exclusive possession of the location where the firearm is found, the State is required to show other incriminating circumstances in order to establish constructive possession. *State v. Young*, 190 N.C. App. 458, 461, 660 S.E.2d 574, 577 (2008). Constructive possession depends on the totality of the circumstances in each case. *State v. Glasco*, 160 N.C. App. 150, 157, 585 S.E.2d 257, 262, disc. review denied, 357 N.C. 580, 589 S.E.2d 356 (2003).

*State v. Taylor*, — N.C. App. —, —, 691 S.E.2d 755, 764 (2010). “The requirements of power and intent necessarily imply that a defendant must be aware of the presence of [a firearm] if he is to be convicted of possessing it.” *State v. Davis*, 20 N.C. App. 191, 192, 201 S.E.2d 61, 62 (1973).

“[T]here must be more than mere association or presence linking the person to the item in order to establish constructive possession.” *State v. Alacoste*, 158 N.C. App. 485, 490, 581 S.E.2d 807, 810 (2003). See *Glasco*, 160 N.C. App. at 157, 585 S.E.2d at 262-63 (noting that, among other things, the fact that the victim’s neighbor saw the defendant jumping over a fence into her back yard, near the shed in another neighbor’s yard, and that the other neighbor then found the gun in his back yard, near the shed in a pile of tires, “provides a sufficient link between defendant and a firearm to allow for the jury’s consideration”).

“[C]onstructive possession cases often include evidence that the defendant had a specific or unique connection to the place where the

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[contraband was] found." *State v. Ferguson*, — N.C. App. —, —, 694 S.E.2d 470, 477 (2010). See, e.g., *State v. Boyd*, 154 N.C. App. 302, 307, 572 S.E.2d 192, 196 (2002) (State presented evidence that "defendant was the only person who could have placed the drugs where they were found").

In the instant case, defendant disputes that he possessed the missing gun and contends that there is no evidence that he actually possessed the gun. When a defendant does not actually possess a gun, the State is required to prove that the defendant constructively possessed the gun. The issues of constructive possession are: (1) whether defendant was aware of the gun's presence; (2) whether he had the power and intent to control its disposition or use; and (3) whether defendant had exclusive possession of the location where the gun was found.

The State's evidence shows that defendant was aware of the gun's presence because he possessed the gun on at least two prior occasions. Defendant was also very familiar with the master bedroom of Carroll's home, the room where the gun was located. Since Carroll saw only one person break into, enter, and flee her home on 29 November 2007, and she did not give anyone permission to enter her home that day or to take the gun, defendant had the power and intent to control the gun's disposition.

"When the defendant does not have exclusive possession of the location where the firearm is found, the State is required to show other incriminating circumstances in order to establish constructive possession." *Taylor*, — N.C. App. at —, 691 S.E.2d at 764. "[M]any constructive possession cases involve evidence that the defendant behaved suspiciously[.]" *Ferguson*, — N.C. App. at —, 694 S.E.2d at 477.

When the officers arrived at Bass' home, they observed defendant and three other males standing on Bass' front porch and the gold automobile parked in Bass' driveway. The officers performed a search of Bass' home and determined that nobody other than Bass and her daughter were currently in the home. Since defendant did not have exclusive possession of Bass' home, the State was required to show "other incriminating circumstances" in order to show that defendant constructively possessed the gun.

When Detective Parker arrived at Carroll's home, he investigated and observed that "[n]othing in the house seemed to be disturbed."

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When he asked Carroll if anything was missing, Carroll “stated [that] a handgun was missing from the nightstand beside her bed.” Carroll then showed Detective Parker the empty nightstand drawer where she kept the gun. Carroll did not report any other items missing from her home.

Within fifteen minutes from the time Detective Parker arrived at Carroll’s home, defendant left Carroll’s home and entered the home of his former girlfriend through the back door and walked past the clothes hamper in the laundry area. When Bass’ daughter stated that law enforcement officers were “around the house,” defendant immediately fled Bass’ home through the front door and stood on the front porch.

When the officers searched Bass’ home they found a 9 mm handgun in the clothes hamper in the laundry area by Bass’ back door. The serial number on the handgun found in the clothes hamper matched the handgun missing from the drawer in the nightstand in the master bedroom of Carroll’s home. Neither Bass nor anyone else in her home possessed a gun.

These facts show that defendant: (1) had a specific connection to the place where the gun was found, (2) behaved suspiciously, and (3) was aware of the gun’s presence at Bass’ home. They further show that since defendant had taken the gun from Carroll and moved it to the clothes hamper, that he had the power and intent to control its disposition or use.

In conclusion, the State’s evidence of “other incriminating circumstances” establishes that defendant constructively possessed the gun. Considering the totality of the circumstances, the State presented substantial evidence of defendant’s constructive possession of the gun. The trial court properly denied defendant’s motion to dismiss the charge of possession of a firearm by a felon. Defendant’s issue on appeal is overruled.

**IV. TRIAL COURT’S COMMENTS ABOUT DEFENDANT’S ABSENCE**

**[4]** Defendant argues that he is entitled to a new trial because the trial court’s improper comments about his absence from the courtroom deprived him of his rights to a fair trial and due process. We disagree.

Although defendant did not object to the [trial court’s comments], any error is still preserved for appeal. Whenever a defendant alleges a trial court made an improper statement by expressing

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an opinion on the evidence in violation of N.C.G.S. §§ 15A-1222 and 15A-1232, the error is preserved for review without objection due to the mandatory nature of these statutory prohibitions. *See State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989).

*State v. Duke*, 360 N.C. 110, 123, 623 S.E.2d 11, 20 (2005).

N.C. Gen. Stat. § 15A-1222 (2009) states that “the judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury.” N.C. Gen. Stat. § 15A-1222 (2009). N.C. Gen. Stat. § 15A-1232 (2009) states that “in instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence.” N.C. Gen. Stat. § 15A-1232 (2009).

“‘Also, an alleged improper statement will not be reviewed in isolation, but will be considered in light of the circumstances in which it was made. Furthermore, defendant must show that he was prejudiced by a judge’s remark.’” *State v. Jones*, 358 N.C. 330, 355, 595 S.E.2d 124, 140 (2004) (*quoting State v. Weeks*, 322 N.C. 152, 158, 367 S.E.2d 895, 899 (1988) (internal citations omitted)). That is, he must show that “there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached” by the jury. N.C. Gen. Stat. § 15A-1443(a) (2009).

In the instant case, although defendant failed to return to the courtroom after the lunch recess on the first day of the trial, his counsel returned and represented him when the trial resumed. The court instructed the jury as follows:

Good afternoon, ladies and gentlemen. Sorry for the delay. The defendant, for whatever reason and only known to him, has refused to return after the lunch recess. We have given him ample opportunity to show up. He has failed to do so. His lawyer has asked to continue the trial. The Court, in its discretion, has refused and denied this request for a continuance. This is permissible and we’re going to go forward with the trial of this matter in his absence.

His absence is not to concern you for any reason whatsoever with regard to your job in this case and that is to hear the evidence as it comes from this witness stand and to render a fair and impartial verdict based on the evidence that you have heard as it comes from the witness stand.

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Defendant's counsel did not object to the court's instruction. However, any error is still preserved for appeal. *Jones*, 358 N.C. at 355, 595 S.E.2d at 140.

The trial court did not express an opinion on any statement of fact to be decided by the jury, nor did it express an opinion as to whether or not a fact had been proved. Furthermore, the trial court did not comment on the evidence or the application of the law to the evidence. In light of the circumstances in which the comment was made, the trial court merely explained defendant's absence for the record. Therefore, neither N.C. Gen. Stat. §§ 15A-1222 nor 15A-1232 apply. Furthermore, even assuming *arguendo* that these statutes applied and that the trial court erred, defendant cannot show that, but for the trial court's statement, the jury would have reached a different result. Defendant's issue on appeal is overruled.

**V. ORDER OF RESTITUTION**

[5] Defendant argues that the trial court committed reversible error by ordering him to pay restitution when the State presented no evidence to support the award. We agree, and we therefore vacate and remand the restitution order.

Defendant raises for the first time on appeal an objection to that portion of his sentence requiring him to pay \$217.40 to Willis in restitution.

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure permits review of issues that "by rule or law [are] deemed preserved[.]" N.C.R. App. P. 10(b)(1) (2009). Furthermore, N.C. Gen. Stat. § 15A-1446(d)(18) (2009) allows for appellate review of sentencing errors even where there was no objection at trial. *State v. Reynolds*, 161 N.C. App. 144, 149, 587 S.E.2d 456, 460 (2003). On appeal, we consider *de novo* whether the restitution order was "'supported by evidence adduced at trial or at sentencing.'" *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (quoting *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995)).

In *Wilson*, our Supreme Court held that "the amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." 340 N.C. at 726, 459 S.E.2d at 196; see *State v. Daye*, 78 N.C. App. 753, 756, 338 S.E.2d 557, 560 (1986). "[T]o justify an order to pay restitution, 'there must be something more than a guess or conjecture as to an appropriate amount of restitution.'" *State v. Clifton*, 125 N.C. App. 471, 480, 481 S.E.2d 393,

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399 (1997) (quoting *Daye*, 78 N.C. App. at 757-58, 338 S.E.2d at 561 (1986)). “Even though recommendations of restitution are not binding, we see no reason to interpret the statutes of this State to allow judges to make specific recommendations that cannot be supported by the evidence before them.” *Daye*, 78 N.C. App. at 757, 338 S.E.2d at 560. Therefore, “[r]egardless of whether restitution is ordered or recommended by the trial court, the amount must be supported by the evidence.” *Id.* Unsworn statements of a prosecutor, standing alone, cannot support an award of restitution. *State v. Buchanan*, 108 N.C. App. 338, 341-42, 423 S.E.2d 819, 821 (1992).

In the instant case, Detective Parker testified that the back doors of Carroll’s home were “busted in,” that “[t]here were splinters of wood laying on the floor,” and that “the lock had been kicked in.” A photograph of the damaged doors was shown to the jury, and the State submitted a Restitution Worksheet, Notice and Order, stating that there was damage caused to the home. Though defendant did not contest the amount on the worksheet, this is not the same as a stipulation to the amount of restitution. See *State v. Replogle*, 181 N.C. App. 579, 584, 640 S.E.2d 757, 761 (2007). Furthermore, the worksheet was an unsworn statement by a prosecutor and as such “does not constitute evidence and cannot support the amount of restitution recommended.” *Buchanan*, 108 N.C. App. at 341, 423 S.E.2d at 821. “[W]hen . . . there is some evidence as to *the appropriate amount* of restitution, the recommendation will not be overruled on appeal.” *State v. Davis*, 167 N.C. App. 770, 776, 607 S.E.2d 5, 10 (2005) (emphasis added) (quoting *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986)) (affirming restitution award for \$180.00 when evidence indicated that victim had between \$120.00 and \$240.00 stolen from her pocketbook).

Here, there was no evidence as to “the appropriate amount” of restitution. There was merely testimony and visual evidence that Carroll’s door was “busted in.” After careful review of the record, we find no evidence of the cost of the broken door or who paid for it. See *Clifton*, 125 N.C. App. at 480, 481 S.E.2d at 399 (“After careful review of the record we find no evidence of the cost of [the victim’s] funeral or who paid for it.”). Therefore, the restitution portion of the judgment must be vacated and remanded to the trial court for redetermination. *Davis*, 167 N.C. App. at 776-77, 605 S.E.2d at 10.

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**VI. CONCLUSION**

We arrest judgment for defendant's conviction for felonious larceny, we find no error in defendant's convictions for felonious breaking or entering and possession of a firearm by a felon, and we vacate and remand the restitution portion of defendant's sentence.

Judgment arrested in part, no error in part, and vacated and remanded in part.

Judges HUNTER, Robert C. and GEER concur.

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STATE OF NORTH CAROLINA v. BARRY LEE GREEN

No. COA10-84

(Filed 1 March 2011)

**1. Witnesses— expert testimony—pharmacology—physiology—knowledge—skill—training—education**

The trial court did not abuse its discretion in a driving while impaired case by allowing a witness to give expert testimony in the areas of pharmacology and physiology. The witness was better informed than the jury about the subject of alcohol as it related to human physiology and pharmacology based on his knowledge, skill, experience, training, and education.

**2. Evidence— opinion testimony—post-driving consumption of alcohol—relevancy**

The trial court did not err in a driving while impaired case by allowing an expert witness to give opinion testimony regarding defendant's post-driving consumption of alcohol because it did not amount to an opinion about defendant's credibility. Instead, it served to assist the jury in determining whether defendant's blood alcohol content was in excess of the statutory limit imposed under N.C.G.S. § 20-138.1(a)(2).

**3. Evidence— opinion testimony—alcohol concentration at various times and scenarios**

The trial court did not err in a driving while impaired case by allowing an expert witness to testify about defendant's alcohol

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concentration at various times and under various scenarios. The opinion testimony went to the weight of the evidence to be considered rather than its admissibility.

**4. Sentencing—aggravating factor—breath alcohol concentration of 0.16 or greater—no Blakely error**

The trial court did not err in a driving while impaired case by finding the aggravating factor that defendant had a breath alcohol concentration of 0.16 or greater. Contrary to defendant's assertion, *Blakely v. Washington* was not implicated because the level four punishment imposed by the trial court was within the presumptive range so that the trial court did not enhance defendant's sentence even after finding aggravating factors. Further, the court acted within its sentencing authority under N.C.G.S. § 20-179.

Appeal by defendant from judgment entered 28 April 2009 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 29 September 2010.

*Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for the State.*

*George B. Currin for defendant-appellant.*

BRYANT, Judge.

Because the trial court was within its discretion to allow Paul Glover to testify as an expert witness in the area of physiology and pharmacology, and because Glover's testimony was permissible under Rules 702 and 703 of our Rules of Evidence, there was no error in the trial court's rulings.

The record evidence tends to show that, on 14 December 2006, at approximately 8:00 p.m., an SUV entered the intersection of Lynn Road and Glendower Road and narrowly avoided colliding with another vehicle, causing that vehicle to crash into a street sign. The SUV continued on Glendower Road until it was stopped by a witness to the incident. The witness pulled along side the SUV and spoke to the driver through her passenger window. The driver "just slowly turned his head to the left side. His eyes were kind of half shut and glazed looking, and he just said: Huumuh? . . . And he just sat and stared at [the witness], so [she] knew at that time that he wasn't really processing what [the witness] was saying to him." The SUV soon pulled away.

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Senior Officer M.D. Larsen, with the Raleigh Police Department, responded to a 9-1-1 call that came in at 8:06 p.m. At 9:38 p.m., after speaking with both the person whom the SUV almost hit and the witness, Officer Larsen traveled to the address at which the SUV was registered and observed a vehicle matching the SUV's description. Officer Larsen asked to speak to the owner. After a few minutes, defendant came down the stairs. Defendant appeared to be "sluggish, slow." "I could smell the odor of mouthwash with a moderate to strong odor of alcohol coming through that." Officer Larsen informed defendant as to why he was there and asked if defendant had had anything to drink. Defendant initially denied having had anything, but soon stated, "Well, maybe I had a glass—one glass of wine." Ultimately, defendant stated that he had consumed five glasses of wine after arriving home at 7:15. Defendant was taken into custody for impaired driving in violation of N.C. Gen. Stat. § 20-138.1. The witness later identified defendant as the SUV driver. At trial, Officer Larsen gave the following testimony:

Q. Okay. Before you put him under arrest, based on your observations of [defendant], did you form an opinion satisfactory to yourself as to whether or not [defendant] had consumed a sufficient quantity of some impairing substance as to appreciably impair his mental and/or physical faculties?

. . .

A. It was my opinion that the defendant had consumed a sufficient quantity of an impairing substance so that his mental and physical faculties were both appreciably impaired.

Q. Did you have an opinion as to what the impairing substance was?

A. I believed it to be some type of alcohol.

Officer Larsen transported defendant to the Wake County Detention Center, where, at 11:28 p.m., he was administered two sequential tests to determine blood alcohol concentration (BAC). Defendant's lowest result indicated that his blood alcohol concentration was 0.19 grams of alcohol per 100 milliliters of blood.

A trial was held in Wake County District Court before Judge Anne Salisbury. Judge Salisbury found defendant guilty of impaired driving and, on 4 March 2008, entered judgment against him. Defendant appealed to Wake County Superior Court.

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On 22 April 2009, Judge Carl R. Fox commenced a jury trial in Wake County Superior Court. Paul Glover, Branch Head for the Forensic Tests of Alcohol, a branch of the North Carolina Department of Health and Human Services, was allowed to testify as an expert in breath alcohol testing, in the Intoxilyzer 5000, and in blood alcohol physiology, pharmacology and related research. Glover testified that he used defendant's test result for blood alcohol concentration taken at 11:28 p.m., and performed retrograde extrapolation to determine defendant's blood alcohol concentration at approximately 8:00 p.m. Glover testified that, at 8:06 p.m., defendant's blood alcohol concentration would have been 0.24.

At the conclusion of the evidence, the jury found defendant guilty of driving while impaired. In accordance with the jury verdict, Judge Fox sentenced defendant to an active term of 120 days but suspended the sentence and placed defendant on unsupervised probation for 12 months. Defendant was further ordered to obtain a substance abuse assessment, surrender his drivers license, and complete 48 hours of community service. Defendant appeals.

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On appeal, defendant raises the following four questions: Did the trial court err in allowing Paul Glover to give (I) expert testimony in the area of pharmacology and physiology; and (II) opinion testimony on the issue of defendant's post-driving consumption of alcohol and (III) blood alcohol concentration; and did the trial court err in (IV) finding an aggravating factor for sentencing purposes.

*I*

[1] Defendant argues that the trial court abused its discretion in allowing Paul Glover to give expert testimony in the areas of pharmacology and physiology. We disagree.

"Trial courts are afforded wide latitude of discretion when making a determination about the admissibility of expert testimony. Thus, a trial court's ruling on . . . the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *State v. Taylor*, 165 N.C. App. 750, 753, 600 S.E.2d 483, 486 (2004) (citation, brackets, and internal quotations omitted).

Pursuant to North Carolina General Statutes, section 8C-1, Rule 702, a witness may be qualified "as an expert by knowledge, skill, experience, training, or education . . ." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2009). "North Carolina case law requires only that the expert

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be better qualified than the jury as to the subject at hand, with the testimony being ‘helpful’ to the jury.” *State v. Davis*, 106 N.C. App. 596, 601, 418 S.E.2d 263, 267 (1992) (citing *State v. Huang*, 99 N.C. App. 658, 663, 394 S.E.2d 279, 282, *disc. rev. denied*, 327 N.C. 639, 399 S.E.2d 127 (1990)). “It is well-established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony.” *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citing N.C.G.S. § 8C-1, Rule 104(a) (2003)). In *Howerton*, our Supreme Court set out a three step inquiry governing the admissibility of expert testimony:

- (1) Is the expert’s proffered method of proof sufficiently reliable as an area for expert testimony? [*State v. Goode*, 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-40 (1995)].
- (2) Is the witness testifying at trial qualified as an expert in that area of testimony? *Id.* at 529, 461 S.E.2d at 640.
- (3) Is the expert’s testimony relevant? *Id.* at 529, 461 S.E.2d at 641.

*Howerton*, 358 N.C. at 458, 597 S.E.2d at 686. Defendant contests the application of the second prong—whether Glover qualified as an expert in the areas of pharmacology and physiology.

According to his *curriculum vitae*, Glover was Branch Head for the North Carolina Department of Health and Human Services, Forensic Tests for Alcohol Branch. In this capacity, his duties included providing scientific expertise and in-the-field guidance; testifying as an expert witness in court proceedings; maintaining a laboratory facility for the scientific analysis of aqueous alcoholic simulator solution and impairing substances including alcohol, in both human breath and blood; evaluating the methodology and techniques related to the testing of blood and urine for the presence of alcohol and other impairing substances; and evaluating new breath alcohol testing technology, so as to accomplish the Branch mandate of maintaining the highest standard of testing. Glover has given testimony as an expert more than 220 times in the past 11 years and assisted with over 600 different cases.

Here, Glover was proffered as an expert in breath alcohol testing; in the Intoxilyzer 5000; and in blood alcohol physiology, pharmacology and related research.

Q. Now, Mr. Glover, turning your attention to blood alcohol physiology, pharmacology, and related research. First of all, can you explain to the jury what that is?

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A. What this is addressing would be how the body deals with alcohol; that is, when it gets—when they consume it, how it goes from being in their mouth to being in their blood to being in their tissues, to being in their brain, and ultimately showing up on their breath. The physiological process is how it's all transported and dealt with.

The pharmacology aspect of it is what the alcohol does to the human body when it's in it.

Related research would deal with the number of studies that have been done for probably the past 70 years where they've looked at those very things. What happens to the alcohol? What areas does it affect? How does it affect people? What effects do we see at different alcohol concentrations?

Glover testified that he received a B.S. and a master's degree in biology from Florida State University in 1974 and 1978, respectively. He worked as a research scientist responsible for giving in-service training to field staff who train officers on how to operate and maintain breath test instrumentation and for evaluating State Bureau of Investigation agents who seek to become blood alcohol chemical analysts.

Glover's curriculum vitae also included courses he took at the Indiana University, Center for Studies of Law in Action, on "Tests for BAC in Highway Safety Programs: Supervision and Expert Testimony" and "The Effects of Drugs on Human Performance and Behavior" and a workshop entitled "Forensic Toxicology Review," presented by the Society of Forensic Toxicologists in the Research Triangle Park. And, since 1998, Glover has attended the annual meeting of the "International Association for Chemical Testing." Glover also testified about his research, which included testing more than 1,000 people over the past 12 years in controlled drinking exercises, to measure blood alcohol concentration. Glover testified that, of the 220 times he had been tendered and qualified as an expert, his testimony included breath alcohol testing greater than 50% of the time and more than 90% of the time included blood alcohol physiology, pharmacology, and related research.

On voir dire, the trial court asked what training Glover had "with respect to this physiology and . . . the elimination of alcohol or the results of alcohol in the body?" Beyond his formal education, Glover's training came from reading peer-reviewed papers, the instruction he received at Indiana University, and his own experience in dosing

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individuals with alcohol. Glover testified about the process by which a human body eliminates alcohol, as well as the limited range of alcohol elimination rates observed in studies performed over the past seventy years. Glover provided information and examples as to how an alcohol elimination rate is used in retrograde extrapolation<sup>1</sup> to determine a prior blood alcohol concentration at a relevant point in time.

We also note that Glover has testified as an expert in a number of cases that have come before our appellate courts: *Cook*, 362 N.C. 285, 661 S.E.2d 874; *State v. Borges*, 183 N.C. App. 240, 644 S.E.2d 250 (2007); *State v. Corriher*, 184 N.C. App. 168, 645 S.E.2d 413 (2007) (challenging retrograde extrapolation); *State v. Fuller*, 176 N.C. App. 104, 626 S.E.2d 655 (2006); *State v. Teate*, 180 N.C. App. 601, 638 S.E.2d 29 (2006); *State v. Taylor*, 165 N.C. App. 750, 600 S.E.2d 483 (2004) (challenging retrograde extrapolation); and *State v. Speight*, 166 N.C. App. 106, 602 S.E.2d 4 (2004) (challenging expert status), 359 N.C. 602, 614 S.E.2d 262 (2005) (finding *Blakely* error), vacated and remanded, 548 U.S. 923, 165 L. Ed. 2d 983, *rev'd in part*, 361 N.C. 106, 637 S.E.2d 539 (2006).

Based on his knowledge, skill, experience, training, and education, Glover was better informed than the jury about the subject of alcohol as it relates to human physiology and pharmacology. *See N.C. R. Evid. Rule 702(a); Davis*, 106 N.C. App. 596, 418 S.E.2d 263. Therefore, the trial court did not abuse its discretion by allowing Glover to testify as an expert in the areas of pharmacology and physiology.

## II

[2] Defendant argues that the trial court erred in allowing Glover to give opinion testimony regarding defendant's post-driving consumption of alcohol. It is his contention that Glover's testimony amounted to an opinion about the truthfulness of defendant's statement to Officer Larsen that he consumed wine after returning home. We disagree.

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience,

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1. "Retrograde extrapolation is a mathematical analysis in which a known blood alcohol test result is used to determine what an individual's blood alcohol level would have been at a specified earlier time. The analysis determines the prior blood alcohol level on the bases of (1) the time elapsed between the occurrence of the specified earlier event (e.g., a vehicle crash) and the known blood test, and (2) the rate of elimination of alcohol from the subject's blood during the time between the event and the test." *State v. Cook*, 362 N.C. 285, 288, 661 S.E.2d 874, 876 (2008).

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training, or education, may testify thereto in the form of an opinion.” N.C. R. Evid. 702(a). However, “expert testimony on the credibility of a witness is not admissible.” *State v. Aguallo*, 318 N.C. 590, 598, 350 S.E.2d 76, 81 (1986) (noting the Official Commentary to Rule 608(a) (Opinion and reputation evidence of character)). “An expert witness’ view as to probabilities is often helpful in the determination of questions involving matters of science or technical or skilled knowledge. Expert testimony may be given in terms of an opinion that something might, could or would produce a certain result.” *Lockwood v. McCaskill*, 262 N.C. 663, 667, 138 S.E.2d 541, 544 (1964) (citation and emphasis omitted).

Glover defined post-driving consumption as “a situation where we have a driving event, whether it’s a vehicle stop or a crash, and then at some point after that event there is a claim of consumption of alcohol.” When asked whether he could determine whether post-driving consumption had occurred, Glover responded, “I can evaluate it and give an opinion as to what I’ll say is a probability of it.” Glover went on to discuss the factors he considered when calculating defendant’s blood alcohol content at the time of the 9-1-1 call—8:06 p.m., on 14 December 2006: the alcohol concentration recorded at 11:28 p.m.; the elapsed time; the rate at which a human body eliminates alcohol; defendant’s reported size and gender; and defendant’s assertions to Officer Larsen that he consumed as little as no alcohol to as much as five glasses of wine. Glover testified that, in performing his calculations, he made certain assumptions, such as: each glass contained five ounces of wine; the wine was 12% alcohol—though he acknowledged that the alcohol content of some wines may be 14% or 20%; and defendant’s actual weight was accurately reflected on the police booking sheet. Assuming these factors, and presuming defendant had nothing more to drink after 8:06 p.m., Glover testified that defendant’s blood alcohol content would have been 0.24 at the time of the 9-1-1 call; presuming one glass of wine after 8:06 p.m.—0.23 BAC; and presuming five glasses of wine after 8:06 p.m.—0.19 BAC. Glover also testified that, regardless of the number of glasses, if defendant consumed no wine before 8:06 p.m. and registered a 0.19 blood alcohol concentration at 11:28 p.m., defendant would have to have consumed 88 ounces of wine, or just under three quarts, after driving.

This testimony by Glover did not amount to opinion testimony concerning defendant’s credibility. *See Id.* (an expert may testify “in terms of an opinion that something might, could or would produce a

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certain result.”). Therefore, the trial court did not err in allowing Glover to testify as to how defendant’s calculated blood alcohol content would have been altered by defendant’s stated post-driving consumption, since such statements did not constitute testimony as to defendant’s credibility but did serve to assist the jury in determining whether defendant’s blood alcohol content at 8:06 p.m. on 14 December 2006 was in excess of the statutory limit of 0.08 imposed under N.C.G.S. § 20-138.1(a)(2) (2009). Accordingly, defendant’s argument is overruled.

*III*

[3] Defendant argues that the trial court erred in allowing Glover to testify to defendant’s alcohol concentration at various times and under various scenarios because such testimony was premised upon impermissible factual assumptions. Specifically, defendant contends that Glover’s calculations assumed the amount of wine in defendant’s glass and when it was consumed. We disagree.

Our General Statutes allow the admission of opinion testimony from those who, by knowledge, skill, experience, training, or education, are deemed experts—if their scientific, technical or other specialized knowledge will assist the fact finder to determine a fact in issue. N.C. R. Evid. 702(a). “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing.” N.C. R. Evid. 703 (2009). “North Carolina courts have consistently regarded blood alcohol retrograde extrapolation as the domain of expert witnesses.” *Cook*, 362 N.C. at 293, 661 S.E.2d at 879 (citing *State v. Davis*, 142 N.C. App. 81, 89-90, 542 S.E.2d 236, 241 (“examining the ‘expert testimony’ of a toxicologist under the standard of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238 (1999), and noting ‘[w]e have accepted the reliability of extrapolation evidence since 1985’”), *disc. rev. denied*, 353 N.C. 386, 547 S.E.2d 818 (2001); *State v. Catoe*, 78 N.C. App. 167, 168-69, 336 S.E.2d 691, 692-93 (1985) (“holding blood alcohol concentration retrograde analysis admissible when a ‘qualified expert’ gave ‘opinion testimony on scientific matters’ and noting the ‘simple mathematical extrapolation’ performed”), *disc. rev. denied*, 316 N.C. 380, 344 S.E.2d 1 (1986)). We are now presented with the issue of whether the trial court properly admitted the opinion testimony of Glover, a witness found to be an expert and qualified to testify regarding retrograde extrapolation, given defendant’s assertions of post-driving alcohol consumption.

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As previously stated, the trial court must determine whether “the expert’s proffered method of proof [is] sufficiently reliable as an area for expert testimony[.]” *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686 (citing *Goode*, 341 N.C. at 527-29, 461 S.E.2d at 639-40). “[T]his requires a preliminary assessment of whether the reasoning or methodology underlying the testimony is sufficiently valid and whether that reasoning or methodology can be properly applied to the facts in issue.” *Goode*, 341 N.C. at 527, 461 S.E.2d at 639 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.* —, U.S. —, 125 L. Ed. 2d 469 (1993)).

[I]f “the trial court is without precedential guidance or faced with novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques,” the trial court must look to other “‘indices of reliability’ to determine whether the expert’s proffered scientific or technical method of proof is sufficiently reliable[.]”

*Taylor*, 165 N.C. App. at 756, 600 S.E.2d at 488 (quoting *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687).

[T]he trial court should generally focus on the following nonexclusive “indices of reliability” to determine whether the expert’s proffered scientific or technical method of proof is sufficiently reliable: “the expert’s use of established techniques, the expert’s professional background in the field, the use of visual aids before the jury so that the jury is not asked ‘to sacrifice its independence by accepting [the] scientific hypotheses on faith,’ and independent research conducted by the expert.”

*Corriher*, 184 N.C. App. at 171, 645 S.E.2d at 415 (quoting *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687).

[O]nce the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert’s opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert’s conclusions go to the weight of the testimony rather than its admissibility.

*Taylor*, 165 N.C. App. at 756, 600 S.E.2d at 488 (quoting *Howerton*, 358 N.C. at 460-61, 597 S.E.2d at 687-88).

Glover testified that he has been qualified as an expert more than 220 times, with his testimony relating to breath alcohol testing

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greater than 50% of the time and to blood alcohol physiology, pharmacology, and related research more than 90% of the time (some of those cases, as previously cited, have come before this Court); his research included testing more than a thousand people over the past 12 years in controlled drinking exercises to measure blood alcohol concentration; and he acknowledged studies of alcohol elimination rates in humans that have been performed over the past seventy years. Glover was admitted as an expert in breath alcohol testing, the Intoxilyzer 5000, and in blood alcohol physiology, pharmacology and related research. In his testimony, Glover provided information and examples as to how an alcohol elimination rate is used in retrograde extrapolation to determine a prior blood alcohol concentration at a relevant point in time.

Glover testified that he could “give a calculation as to what the alcohol concentration was at [an] earlier time and then factor in the contribution of what would have been—what was claimed to have been consumed [after the driving incident].” In extrapolating a person’s prior blood alcohol content, Glover testified that he looks for the time of the vehicle stop or accident, the time of the alcohol test, whether the test was a blood draw or a breath alcohol test, the size and gender of the individual, and what the person claimed to have consumed.

Q. And how do you know how to make these types of calculations?

A. Well, we do controlled drinking exercises on a regular basis . . . . We know—with formulas, we know how much to give a hundred-pound female or a 200-pound male. If they’re drinking beer or wine or hard liquor, we know how much—what volume to give them based on their weight and gender in order to get them to a targeted alcohol concentration.

. . .

I can’t tell you the number of exercises. I know I’ve been involved in dosing over a thousand people, and whether it’s a thousand or 2,000, over the past 12 years I’ve been involved in it. My staff has been involved in it. . . . So we dose all kinds of people.

. . .

Q. And during these controlled drinking sessions, as you’ve seen the alcohol concentration go down what if any change in behavior have you noticed?

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A. You'll see the person will still be impaired, but you'll see some change, but it takes—it takes time. Your alcohol concentration only goes down approximately 0.0165 per hour, and so the difference from someone who is at a .12 to someone who is at a .11, and an hour goes by, you've only decreased it by .016, so you're not going to see a dramatic change in that period.

As stated before, Glover assumed that each of defendant's glasses contained five ounces of wine consisting of 12% alcohol and that the weight listed on defendant's police booking sheet was accurate. Factoring in those assumptions, Glover calculated that, at the time of the 9-1-1 call, 8:06 p.m., defendant's blood alcohol content would have been 0.24—presuming defendant had nothing more to drink after 8:06 p.m.; 0.23 BAC—presuming defendant had one glass of wine after 8:06 p.m.; and 0.19 BAC—presuming defendant had five glasses of wine after 8:06 p.m. Glover also testified that, regardless of the number of glasses, for defendant to have consumed wine only between the time of the 9-1-1 call, 8:06 p.m., and the time Officer Larsen arrived at his residence, 9:38 p.m., defendant would need to have consumed 88 ounces of wine, or just under three quarts, to register a 0.19 blood alcohol concentration at 11:28 p.m.

Noting Glover's use of retrograde extrapolation—a technique accepted in our courts since 1985 (*see Catoe*, 78 N.C. App. 167, 336 S.E.2d 691 (1985)), and his aforementioned training and experience, including independent research involving the analysis and measurement of blood alcohol concentration and elimination, and his challenge to opinion testimony about defendant's blood alcohol content at various times and under various scenarios based upon defendant's assertions of post-driving alcohol consumption went to the weight of the testimony to be determined by the jury rather than its admissibility so the trial court did not violate the parameters of Rules 702 and 703. *See Corriher*, 184 N.C. App. 168, 645 S.E.2d 413; *Taylor*, 165 N.C. App. 750, 600 S.E.2d at 483. Therefore, the trial court did not abuse its discretion in admitting Glover's testimony. Accordingly, defendant's argument is overruled.

## IV

[4] Last, defendant argues that the trial court erred by finding the aggravating factor that defendant had a breath alcohol concentration of 0.16 or greater. Defendant contends that such a finding by the court amounted to a *Blakely* error. We disagree.

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In *Blakely v. Washington*, the United States Supreme Court evaluated the constitutionality of a statutory scheme allowing trial courts to enhance a defendant's sentence upon finding certain facts.

[T]he Court cited *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for the proposition that a trial court violates the Sixth Amendment if it finds any fact, other than the fact of a prior conviction, and relies on that fact to impose a sentence "greater than the [statutory] maximum." 542 U.S. at 303. The Court defined "statutory maximum" as the most severe sentence a judge may impose based entirely on facts admitted by the defendant or found by a jury beyond a reasonable doubt. *Id.*

*State v. Norris*, 360 N.C. 507, 513, 630 S.E.2d 915, 918-19 (2006). "Although sentences in the aggravated range require findings of aggravating factors and those in the mitigated range findings of mitigating factors, the trial court is free to choose a sentence from anywhere in the presumptive range without findings other than those in the jury's verdict." *Id.* at 512, 630 S.E.2d at 918.

Under North Carolina General Statutes, section 20-179, the trial court must weigh the seriousness of each aggravating factor and each mitigating factor "in [] light of the particular circumstances of the case." N.C. Gen. Stat. § 20-179 (d) and (e) (2009). "If the judge determines that: . . . (2) [t]here are no aggravating and mitigating factors, or that aggravating factors are substantially counterbalanced by mitigating factors, the judge shall note in the judgment any factors found and the finding that the defendant is subject to the Level Four punishment . . ." N.C. Gen. Stat. § 20-179(f)(2) (2009).

At the sentencing hearing, the trial court found two aggravating factors: that defendant had an alcohol concentration of at least 0.16 at a relevant time after driving and that defendant had at least one prior conviction of an offense of impaired driving that occurred more than seven years before the date of the current offense. The trial court also found two factors in mitigation: that defendant had a safe driving record; and that defendant obtained a substance abuse assessment. The trial court imposed a level four punishment and sentenced defendant to 120 days imprisonment, which sentence was then suspended and defendant placed on unsupervised probation for 12 months. The level four punishment imposed by the trial court was tantamount to a sentence within the presumptive range, so that the

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trial court did not enhance defendant's sentence even after finding aggravating factors. Therefore, *Blakely* is not implicated. *See State v. Hagans*, 177 N.C. App. 17, 31-32, 628 S.E.2d 776, 786 (2006) (noting that "*Blakely* dealt only with the question of whether a trial court may enhance a defendant's sentence above the presumptive range by unilaterally imposing aggravating factors."). Further, the court acted within the sentencing authority conferred to it under N.C.G.S. § 20-179. Accordingly, defendant's argument is overruled.

No error.

Judges STEELMAN and ERVIN concur.

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STATE OF NORTH CAROLINA v. LAMONTE CHARLES JOHNSON, DEFENDANT

No. COA10-26

(Filed 1 March 2011)

**1. Jury—voir dire—limitations—failure to show prejudice**

The trial court did not err in a first-degree murder case by limiting defendant's jury *voir dire*. Even assuming *arguendo* that any limitations were improper, defendant failed to show that he was prejudiced.

**2. Evidence—written statement of coparticipant—corroboration**

The trial court did not err in a first-degree murder case by admitting the written statement of a coparticipant. The statement was not hearsay because it was admitted to corroborate the coparticipant's trial testimony.

**3. Evidence—video recording—coparticipant interrogation**

The trial court did not commit plain error in a first-degree murder case by admitting a video recording of another coparticipant's interrogation. Even without the recorded testimony, the jury was presented with substantial evidence of defendant's guilt. It was not likely that a jury would have reached a different verdict absent admission of this evidence.

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Appeal by defendant from judgment entered on or about 23 April 2009 by Judge J. B. Allen in Superior Court, Durham County. Heard in the Court of Appeals 18 August 2010.

*Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Francis W. Crawley, for the State.*

*Winifred H. Dillon, for defendant-appellant.*

STROUD, Judge.

Lamonte Charles Johnson (“defendant”) appeals from his 20 April 2009 convictions for murder and discharging a firearm into an occupied vehicle. Defendant asserts that the trial court improperly limited jury *voir dire* and improperly admitted a written witness statement and recorded interrogation because they were hearsay not subject to any exception. For the following reasons, we find no error as to both the *voir dire* at trial and as to the admission of the written statement. Further, we find no plain error in the admission of the recorded interrogation.

### I. Background

The State’s evidence in this case tended to show that Defendant, Delano Marley, John Flowers and Robert Lee met at a liquor house on 1 July 2007. The four men left the liquor house in a grey Chevrolet Suburban vehicle and stopped at Lee’s house. When they left Lee’s house, Flowers was driving. One AK-47 assault rifle was in the car and both Marley and defendant were armed with handguns. Defendant was seated in the back passenger’s side seat. Marley was in the front passenger’s side seat and Lee was seated in the back driver’s side seat. At some point in their drive, the men spotted Darriaes McClain and pulled up alongside his car; both Marley and defendant stuck their guns out of the window and defendant fired at McClain’s car. McClain was hit by multiple bullets and died of his injuries.

Defendant was indicted on 7 January 2008 for first-degree murder and discharging a firearm into an occupied vehicle. Defendant came to trial on 20 April 2009. At trial, two other participants in the attack testified against defendant pursuant to plea agreements and in exchange for a reduction in their sentences. A third participant contacted authorities seeking a reduction in his federal sentence on other charges. A jury convicted defendant of first-degree murder on the basis of malice premeditation and deliberation as well as the felony-murder rule and discharging a firearm into an occupied

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vehicle on 23 April 2009. Defendant was sentenced to life in prison without parole for the first-degree murder conviction. The trial court entered a prayer for judgment continued on the firearm conviction. Defendant gave timely notice of appeal in open court.

**II. Analysis**

Defendant asserts that his jury *voir dire* was improperly limited, that the admission of the written statement of witness John Flowers was in error, and that admission of the video recording of the interrogation of Delano Marley was in error. We examine each contention in turn.

**A. Jury *voir dire***

[1] Defendant asserts that his *voir dire* questioning was improperly limited in two respects. He claims first that his questioning was limited with respect to assessing the credibility of witnesses and, secondly, that his questioning was limited as to jurors' ability to follow the law on reasonable doubt. Defendant further asserts these limitations on his *voir dire*, "denied defendant the opportunity to seat an impartial jury by not allowing defense counsel to ask proper questions of prospective jurors . . ." He points to four specific instances in the record to prove his claims. We look to each instance in turn and disagree.

**1) Standard of Review**

Our Supreme Court has observed that, "[i]n this jurisdiction counsel's exercise of the right to inquire into the fitness of jurors is subject to the trial judge's close supervision. The regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion." *State v. Cummings*, 361 N.C. 438, 464, 648 S.E.2d 788, 804 (2007). "In order for the defendant to show reversible error, he must show that the trial court abused its discretion and that he was prejudiced thereby." *State v. Jones*, 339 N.C. 114, 134, 451 S.E.2d 826, 835 (1994). "An abuse of discretion is established upon a showing that the trial court's actions were 'manifestly unsupported by reason' and 'so arbitrary that [they] could not have been the result of a reasoned decision.'" *State v. Williams*, 361 N.C. 78, 81, 637 S.E.2d 523, 525 (2006) (alteration in original) (citations and quotation marks omitted). Appellate review of *voir dire* questioning requires the appellate court to focus not just on isolated questions, but on the "entire record of the *voir dire*." *State v. Jones*, 347 N.C. 193, 203, 491 S.E.2d 641, 647 (1997) (citations omitted).

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## 2) Substantive Issues

The “[t]wo purposes of *voir dire* are to allow the parties (1) to determine whether there exists a reason to challenge a prospective juror for cause; and (2) to intelligently exercise their limited number of peremptory challenges.” *Cummings*, 361 N.C. at 464, 451 S.E.2d at 804 (citations omitted). “Questions designed to measure a prospective juror’s ability to follow the law are proper within the context of jury selection *voir dire*.” *Jones*, 347 N.C. at 203, 491 S.E.2d at 647. However, a defendant is not entitled to put on a mini-trial of his evidence during *voir dire* by using hypothetical questions situations to determine whether a juror would cast a vote for his theory. *Id.* “Hypothetical questions that seek to indoctrinate jurors regarding potential issues before the evidence has been introduced and before jurors have been instructed on applicable principles of law are similarly impermissible.” *State v. Jones*, 347 N.C. 193, 203, 491 S.E.2d 641, 647 (1997) (citations omitted). Specifically, parties are prohibited from asking a prospective juror “how they would be inclined to vote under a certain state of the evidence or upon a given state of facts[,]” *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68, *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 1206 (1976), on the basis that such questions are “confusing to the average juror” and “tend to ‘stake out’ the juror and cause him to pledge himself to a future course of action.” *Id.*

## i) Assessment of Witness Credibility

Defendant points to the following exchange between defense counsel, the State, prospective jurors, and the trial court in support of his assertion that defendant was precluded from inquiring into the jury’s understanding of witness credibility:

[DEFENSE]: Now, when you make a determination about what happens, you’re not to examine but two things. There are only two things you’re going to be examining here. One is the testimony to the witness stand, and two is the physical evidence that may come in.

Ms. Johnson, can you examine the testimony from the witness stand to make a determination if someone’s telling you the truth?

JUROR: Yes, sir.

[DEFENSE]: Mr. Colopy, can you do that, as well?

JUROR: Yes.

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[DEFENSE]: Now, what type of facts would you look at, Mr. Colopy, to make the determination if someone's telling you the truth?

[STATE]: Objection.

THE COURT: Sustained.

In this first exchange, defense counsel attempts to question the prospective juror regarding the “type of facts” that he would use to determine “if someone is telling [him] the truth[.]” As we have noted above, our Supreme Court has made clear that “[h]ypothetical questions that seek to indoctrinate jurors regarding potential issues . . . before jurors have been instructed on applicable principles of law are . . . impermissible.” *Jones*, 347 N.C. at 203, 491 S.E.2d at 647. The jury had not been instructed on the legal standard for weighing a witness’s credibility. The trial court properly interrupted defense counsel’s attempt to “stake out” this juror as to the way he would assess credibility. *See Id.*

The second exchange to which defendant points occurred just moments later, but after the judge had given the standard jury instruction regarding the assessment of evidence and obtained agreement from all jurors that they understood and could obey the law. Those instructions provided, in relevant part, that jurors, “should apply the same test of truthfulness which [they] apply in [their] everyday affairs” and continued to list a variety of factors which were germane to that consideration including “the opportunity of the witness to see, hear, know or remember the facts or occurrences about which he or she testified,” and “any interest, bias or prejudice a witness may have.” *See N.C.P.I.-Crim. 101.15*. Defense counsel then proceeded to question the jurors about specific portions of those instructions:

[DEFENSE]: Mr. Colopy, as the judge said, it’s important—one of the facts that you can look at is the opportunity to see or hear. Would you be able to apply that in listening to the evidence from the witness stand?

JUROR: Yes.

[DEFENSE]: Ms. Falcon, would that be important to you whether a witness actually could have heard or saw [sic] what they said they did?

[STATE]: Objection.

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THE COURT: (No response)

[DEFENSE]: Your Honor, there's an objection from them.

THE COURT: I didn't hear the question. Repeat it, and as to the objection, I'll rule.

[DEFENSE]: Ms. Falcon, would it be important to you that a person could actually observe or hear what they said they have from the witness stand?

[STATE]: Objection.

THE COURT: Sustained to the form of that question. I told you, ladies and gentlemen, what the law is about whether to determine to believe a witness or not. Can you follow the law? Can all of you follow that law?

JURY PANEL: Yes, yes, yes.

THE COURT: Raise your right hands if you can.

JURY PANEL: (Hands raised.)

THE COURT: Go on.

Defense counsel did not merely seek to find if the prospective juror could follow the law as given but, asked her to state the weight that she would give one factor in her analysis—"would it be important to you that a person could actually observe or hear what they said they have from the witness stand?" With no evidence yet before the jury, this question seeks to prepare the way for a particular argument that there is some question about the ability of one or more of the witnesses to "observe or hear what they said they could have from the witness stand." Seeking to "indoctrinate jurors regarding [a] potential issue[] before the evidence had been introduced," *Jones*, 347 N.C. 193, 491 S.E.2d 641, does not serve which are the proper purposes of *voir dire*, "to determine whether there exists a reason to challenge a prospective juror for cause;" or "to intelligently exercise their limited number of peremptory challenges." *Cummings*, 361 N.C. at 134, 451 S.E.2d at 835 (citations omitted). As such, the State's objection was properly sustained.

The third exchange followed soon after the first two. After a restatement of the law by the trial court, defense counsel continued his questioning of a prospective juror regarding the effect on the prospective juror's opinion of testimony obtained from a witness who was receiving a benefit from that testimony:

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[DEFENSE]: Ms. George, would you also—one of the things the judge talked about also is if someone's getting a benefit from testimony. Would you look at that and make a determination of whether you believe their testimony or not?

[STATE]: Objection.

THE COURT: State—that's sustained. That's stating (inaudible) and no evidence has been shown of that.

Again, ladies and gentlemen, I told you how to determine whether to believe a witness. I told you what conditions you should look at, and you should follow that law.

Defendant rightly points out that the question of interested witness testimony is generally one that is ripe for consideration during *voir dire* and points to *State v. Jones*, 347 N.C. 193, 491 S.E.2d 641 (1997) (citations omitted), in support of his contention that defense counsel's questioning regarding interested witness testimony in this instance was proper.

In *Jones*, the State, during *voir dire*, asked the jury panel a series of questions regarding whether prospective jurors would be able to listen to and obey the trial court's instructions on the assessment of interested witness testimony and whether, if they found that testimony believable, they would be able to accord it the same weight as another witness's testimony:

There may be a witness who will testify in this case pursuant to a plea arrangement, plea bargain, a "deal" if you will, with the State. The mere fact that there is some plea arrangement, some plea bargain, entered into [by] one of the codefendants, would that affect your decision or your verdict in this case, just the fact that there had been some plea arrangement with one of the witnesses?

To put it another way, could you listen to the court's instructions of how you are to view accomplice or interested witness testimony, whether it came from the State or the defendant; could you listen and follow the court's instructions as to how you were to view that testimony? Anyone who could not do that?

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After having listened to that testimony and the court's instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness? Anyone who could not do that?

*Id.* at 201-02, 451 S.E.2d at 646-48. Jones is first distinguished by the fact that, during the jury *voir dire* in that case, the State, having the burden of proof, introduced the possibility of witnesses testifying for the State under a plea agreement by stating that, “[t]here may be a witness who will testify in this case pursuant to a plea arrangement, plea bargain, a ‘deal’ if you will, with the State.” *Id.*

A review of the record in the present case indicates that the possibility of interested witness testimony had not been mentioned by the State prior to defense counsel's posing the inquiry in question. Further, though defendant asserts that there was no “substantive difference between the questions posed by defense counsel in this case and those posed by the State in *Jones*,” there are significant differences in the two lines of questioning. In *Jones*, the State's questions focused on juror's being affected by the “mere existence of a plea agreement” and followed by expressly asking jurors whether they “could . . . listen and follow the court's instructions as to how [they] were to view that testimony?” *Id.* Finally, the State in *Jones* asked whether the jurors could follow the law regarding the assessment of interested witness testimony, and gave a proper restatement thereof asking, “having listened to that testimony and the court's instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness?” *Id.*, *See* N.C.P.I.-Crim. 101.15. At each stage in the inquiry, the State in that case focused on the law and sought to query jurors as to their ability to follow it.

Here, unlike in *Jones*, though the judge had instructed that “interest, bias or prejudice” was a valid criterion for each juror's determination of “whether to believe any witness[,]” jurors had been given no guidance as to the law for the assessment of the testimony of an interested witness. *See* N.C.P.I.-Crim. 104.20 (“You may find that a witness is interested in the outcome of this trial. In deciding whether or not to believe such a witness, you may take the witness's interest into account. If, after doing so, you believe the testimony in whole or in part, you should treat what you believe the same way as any other believable evidence.”). Defense counsel sought, without the noticeable and exact preface of relevant law given in *Jones*, to query a juror

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regarding the potential weight she would ascribe to interested witness testimony asking, “would you also—one of the things the judge talked about also is if someone’s getting a benefit from testimony. Would you look at that and make a determination of whether you believe their testimony or not?” As the fact of interested witness testimony had not been introduced in this case, nor had the law properly governing the weight it should be accorded been discussed, *Jones* is inapplicable, and the State’s objection in this case was properly sustained.

**ii) Question regarding reasonable doubt**

Defendant also asserts that he was improperly limited in his questioning of jurors regarding their “ability to follow the law on reasonable doubt.” Defendant points to this fourth exchange in support of that assertion:

[DEFENSE]: Now as the Judge told you, you all are the finders of the facts in this case. And in any case, the Judge is going to give you elements, that you have to find each element beyond a reasonable doubt.

...

Mr. Trullinger, if you hear the evidence, [sic] the see the evidence that comes in, and you find evidence on three factors—or three elements beyond a reasonable doubt, but you don’t find on the fourth element, what would your verdict be?

[STATE]: Objection. Staking out the jury.

[DEFENSE]: That’s not staking.

THE COURT: The law is that if the State has a burden of proving anything beyond a reasonable doubt, and each and every element beyond a reasonable doubt, any one of the elements that they are required to prove, then it would be your duty to find the Defendant not guilty. If you can follow that law, please raise your right hand.

JURY PANEL: (Hands raised.)

In this instance, defense counsel sought to get the prospective juror to state what he would do if he didn’t “find [beyond a reasonable doubt] on the fourth element.” This question attempts to get a juror to “pledge himself to a future course of action.” *Vinson*, 287 N.C. at 336, 215 S.E.2d at 68. Attempting to elicit a prospective juror’s decision

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“under a certain state of the evidence or upon a given state of facts” has been prohibited by our Supreme Court and was properly prohibited in this case. *Id.*

The trial court’s rulings upon all of the State’s noted objections were proper under the law, and defendant has not demonstrated that the rulings were “‘manifestly unsupported by reason’ [nor] ‘so arbitrary that [they] could not have been the result of a reasoned decision.’” *Williams*, 361 N.C. at 81, 637 S.E.2d at 525. The limitations imposed by the trial court on defendant’s jury *voir dire* questions were not an abuse of discretion and may not, therefore, be overturned by this court. *Jones*, 339 N.C. at 134, 451 S.E.2d at 835.

Even were we to assume *arguendo* that any of the above limitations on defendant’s *voir dire* were improper, defendant would still face the burden of proving that “he was prejudiced thereby.” *Id.* review of the entirety of defendant’s *voir dire* convinces us that is not the case. In three of the four instances of which defendant complains, the trial court intervened to state the appropriate law for the jury to follow and queried the jurors about whether they could follow the law. In each instance, all jurors answered they could. Defense counsel asked follow-up questions regarding whether they could follow the law. Given our review of the record, it would appear the *voir dire* afforded to defendant was adequate to allow him “to determine whether there exists a reason to challenge a prospective juror for cause; and . . . to intelligently exercise [his] limited number of peremptory challenges.” *Cummings*, 361 N.C. at 134, 451 S.E.2d at 835. As to the defendant’s contentions regarding interested witness testimony, we have already addressed the propriety of the limitations on defendant’s *voir dire* but note that defendant only used four of his preemptory challenges in this case. Defendant makes no specific contention as to what he asserts would have been gained by further questioning beyond that which was allowed. Accordingly, even if we were to find error with regard to any of the limitations in questioning imposed by the trial court, the defendant has not carried his burden to “show that he was prejudiced thereby.” *Jones*, 339 N.C. at 134, 451 S.E.2d at 835.

#### B. Admission of the written statement of witness John Flowers

[2] Defendant next contends that the statement of witness John Flowers was improperly admitted over defendant’s objection because it was hearsay not subject to any exception. We disagree.

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**1) Standard of Review**

Exceptions to the admission of evidence must generally be preserved by an objection by counsel at the time of their admission. N.C. Gen. Stat. § 8C-1, Rule 103; N.C.R. App. P. 10(a)(1). When preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*. *State v. Wilson* 197 N.C. App. 154, 159, 676 S.E.2d 512, 515 (2009). Failure to object, absent provision in the evidentiary rules, generally constitutes a waiver of any assignment of error on appeal related to the admission of evidence. See *State v. Reid*, 322 N.C. 309, 312, 367 S.E.2d 672, 674 (1988).

**2) Substantive Issues**

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-1, Rule 801 (2007). Hearsay is not to be admitted into evidence, “except as provided by statute or by [the evidentiary] rules.” N.C. Gen. Stat. § 8C-1, Rule 802 (2007).

Statements properly offered to corroborate former statements of a witness are “not offered for their substantive truth and consequently [are] not hearsay.” *State v. Levan*, 326 N.C. 155, 167, 388 S.E.2d 429, 435 (1990). Corroborating statements are those statements that tend “to strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence.” *State v. Higgenbottom*, 312 N.C. 760, 769, 324 S.E.2d 834, 840 (1985). “Nevertheless, if the testimony offered in corroboration is generally consistent with the witness’s testimony, slight variations will not render it inadmissible.” *State v. Warren*, 289 N.C. 551, 557, 223 S.E.2d 317, 320 (1976); *See also State v. Locklear*, 320 N.C. 754, 761, 360 S.E.2d 682, 686 (1987) (“If previous statements offered in corroboration are generally consistent with the witness’s testimony, slight variations between them will not render the statements inadmissible. Such variations only affect the credibility of the evidence which is always for the jury.” (citations omitted)); *State v. Ligon*, 332 N.C. 234, 237, 420 S.E.2d 136, 143 (1987) (“prior consistent statements must corroborate the witness’ testimony, but the corroborative testimony may contain new or additional information when it tends to strengthen and add credibility to the testimony which it corroborates” (citations omitted)).

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## i) Statement of John Flowers

Defendant contends that the admission of the written statement of John Flowers was improper because it was hearsay not subject to any exception. We find that the statement was properly admitted in corroboration of Flowers's trial testimony.

The record shows that Flowers testified at trial that he, defendant, and two other men met at a liquor house in Durham. Flowers got into a gray Chevrolet Suburban vehicle with defendant and the two other men and went to one of the men's houses. When the men left the house, Flowers was driving and defendant was seated in the rear passenger-side seat. As they were driving, one or more of the men spotted McClain, and Flowers began to follow him. When they pulled beside McClain's car, defendant and one of the other men in the car began to fire their weapons. Defendant was armed with a .40 or .45 caliber handgun. Defendant said he was motivated to shoot McClain because McClain had shot at defendant while his daughter was with him.

Defendant asserts that Flower's written statement differs from his trial testimony in that it includes: an assertion that the men left the liquor house to look for some "Crips" that they had been "beefing" with; that all of the men but Flowers were armed; that one of the passengers in the grey Chevrolet Suburban vehicle had an AK-47 rifle, defendant had a .45 caliber handgun, and another of the passengers had a .40 caliber handgun; that defendant had borrowed a .45 caliber handgun from another person, a black male, at the liquor house; that defendant had left his .38 caliber handgun with the black male at the liquor house; that, when they spotted McClain, one of the passengers said, "I'm going to cap him;" then defendant and another of the passengers said, "I'm going to get him too;" and that after the shooting, defendant again exchanged guns with the black male at the liquor house.

It is evident from a review of the record that Flowers's written statement is "generally consistent with [Flowers's] testimony." *Warren*, 289 N.C. at 557, 223 S.E.2d at 320. Both the statement and testimony tell generally the same story. Defendant and his companions drove together, met McClain on the road, and shot him. All points that differ are "slight variations" in Flower's of trial testimony, "which only affect the credibility of the evidence which is always for the jury," e.g. whether the caliber of weapon carried by defendant was either .40 or .45 caliber or .45 caliber specifically, *Locklear*, 320 N.C. at 761, 360 S.E.2d at 686, or are likewise permissible because they add "new or

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additional information” that “strength[ed] and add[ed] credibility” to Mr. Flowers’s testimony, *e.g.* the reason the four men went out driving. *Ligon*, 332 N.C. at 237, 420 S.E.2d at 143. As Flowers’s written statement was properly admitted corroborate of his trial testimony, we find no error in its admission. *See State v. Levan*, 326 N.C. 155, 167, 388 S.E.2d 429, 435 (1990).

### C. Recorded interrogation of Delano Marley

**[3]** Defendant also asserts that the admission of Delano Marley’s interrogation was in error in that the statement was hearsay not subject to any exception with this argument directed to both the statements made by Mr. Marley as well as to the statements made during the interrogation by police. As defendant asserts these claims without having made an objection at trial, he pleads plain error.

#### 1) Standard of Review

The general requirement that a timely objection at trial is required to preserve an assignment of error for appeal is modified when a claim of plain error is made. N.C.R. App. P. 10(a)(4). However, without a timely objection at trial, the burden that an appellant faces in challenging the improper admission of evidence under the plain error standard is higher than that faced by an appellant who has preserved the issue by a proper objection. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). Plain error analysis is limited to review of “jury instructions and evidentiary matters[.]” *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002). The North Carolina Supreme Court has cautioned that the plain error rule is to be “applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done. . . .” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and quotation marks omitted). For an appellate court to find plain error, it must first be convinced that, “absent the error, the jury would have reached a different verdict.” *Reid*, 322 N.C. at 313, 367 S.E.2d at 674 (citation omitted). The burden of proving plain error falls on defendant. *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

As noted above, it is established law in this State that, in order for the appellate court to make a finding of plain error, the court must be convinced that, absent the proposed error, “the jury would have reached a different verdict”. *Reid*, 322 N.C. at 313, 367 S.E.2d at 674. That is not so here.

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Even without the recorded testimony of witness Delano Marley, the jury was presented with substantial evidence of the defendant's guilt. This evidence includes: the in-court testimony of Delano Marley and two of defendant's other companions during the attack was that the defendant went with them in the gray Chevrolet Suburban vehicle, that the vehicle in which defendant was riding, pulled alongside McClain's car and defendant fired his weapon into the vehicle at McClain; the in-court testimony of Mr. Flowers that defendant had a grudge against McClain because McClain shot at him while his daughter was with him; and testimony of the medical examiner confirming that McClain died of his gunshot injuries.

Given the strength and consistency of the evidence against the defendant as to all the essential elements of each of the crimes charged, it is not likely that the jury would have "reached a different verdict" even absent the admission of witness Delano Marley's recorded interrogation and, therefore, there is no plain error in its admission. *Reid*, 322 N.C. at 313, 367 S.E.2d at 674.

**III. Conclusion**

The trial court did not err in the restrictions it placed upon defendant's *voir dire* or in the admission of the written statement of Flowers, nor was there plain error in the trial court's admission of the video of Marley's interrogation.

**NO ERROR.**

Judges MCGEE and ERVIN concur.

**BUSQUE v. MID-AM. APARTMENT COMMUNITIES**

[209 N.C. App. 696 (2011)]

THERESA A. BUSQUE EMPLOYEE, PLAINTIFF v. MID-AMERICA APARTMENT COMMUNITIES AND/OR HERMITAGE @ BEECHTREE, EMPLOYERS, LIBERTY MUTUAL INSURANCE COMPANY F/K/A WAUSAU INSURANCE COMPANY AND/OR TRAVELERS INSURANCE CO., CARRIERS, DEFENDANTS

No. COA10-540

(Filed 1 March 2011)

**1. Workers' Compensation—reflex sympathetic dystrophy—chronic region pain syndrome—failure to show aggravation of pre-existing injury**

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff worker failed to establish that she has reflex sympathetic dystrophy (RSD)/chronic region pain syndrome and by determining that the 18 January 2003 fall did not materially aggravate her pre-existing RSD.

**2. Workers' Compensation—no entitlement to second opinion evaluation and rating—expiration of statute of limitations**

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff worker was entitled to a second opinion evaluation and rating of the percentage of permanent partial disability of plaintiff's left ankle resulting from a compensable work injury on 18 January 2003. The expiration of time in the statute of limitations under N.C.G.S. § 97-25.1 barred the award.

Appeals by plaintiff and defendants from the Opinion and Award entered 18 December 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 December 2010.

*Prather Law Firm, by J.D. Prather, for plaintiff-appellant.*

*Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham and Jennifer Morris Jones, for defendants-appellants.*

MARTIN, Chief Judge.

On 18 January 2003, after a long history of leg and foot complaints, plaintiff Theresa Busque suffered an injury to her left leg, left foot, and right leg in the course and scope of her employment as

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a leasing consultant for defendant Mid-America Apartment Communities (“Mid-America”). Defendants covered her medical expenses related to the treatment of this injury through 21 April 2003, when she was released from medical care with no medical restrictions. Four years later, on 18 July 2007, Ms. Busque filed a Form 33, claiming that she had developed Reflex Sympathetic Dystrophy (RSD) and depression because of the 18 January 2003 injury and that she required further medical treatment. By an Opinion and Award entered 10 December 2009, the Full Commission denied her request for compensation, but awarded her a second opinion evaluation at the expense of defendant Mid-America and its insurance carrier defendant Wausau Insurance Company (“Wausau”). Ms. Busque and defendants appeal from the Commission’s Opinion and Award.

Ms. Busque’s history of foot and leg pain pre-dates the 18 January 2003 injury. In March 1995, Ms. Busque injured her left foot in a “freak accident” when she cut the vein on top of her foot on the exposed iron prongs of a bed frame. This injury caused Ms. Busque to stay out of work and off her feet for approximately nine months.

In 1996, Ms. Busque developed right lower extremity pain because of a misplaced EMG needle. In March 1996, she saw Dr. Marvin Rozear, a board-certified neurologist, complaining of disproportionate pain and some mild discoloration. At his deposition, Dr. Rozear explained that RSD and Chronic Regional Pain Syndrome (CRPS) are diagnosed by the “presence of burning pain [in the extremity involved], color changes ([ranging from paleness or] pallor to beet red or mottled appearance), swelling, changes in hair growth, skin texture[, or] moisture level of skin, changes in nails, changes in bones[,] and allodynia” which is a symptom where a patient experiences intense pain upon slight stimulus. Dr. Rozear, however, did not diagnose Ms. Busque with RSD. Rather, he diagnosed Ms. Busque “with chronic pain in the left foot of unknown etiology.” Ms. Busque followed up with Dr. Rozear on 11 April 1998, 14 April 1998, and 1 November 1999. He did not diagnose RSD at any of these appointments.

On 3 September 1998, Ms. Busque began to see Dr. Billy Huh, who is a board-certified physician in anesthesiology and pain medicine. She complained to him of right leg and foot pain, specifically of heel pain which caused her trouble walking and sleeping. She indicated she could only drive for thirty minutes at a time and only work for two hours a day. At this point in time, she had been out of work at least one and a half years due to pain and had changed jobs five times

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during the prior two years. Ms. Busque visited Dr. Huh eight more times between 2 November 1998 and 29 July 1999 and, at each visit, complained of pain in her right leg and foot. She never mentioned left side pain. On 29 June 1999, Ms. Busque reported to Dr. Huh that an EMG had induced chronic sciatic pain. Dr. Huh did not diagnose her with RSD at any of these eight appointments; rather, he diagnosed her with plantar fasciitis of the right foot. On 29 June 1999, Dr. Huh also diagnosed her with EMG-induced sciatic neuralgia.

Ms. Busque visited Dr. Huh again on 16 December 1999. At this appointment, she complained of left leg pain and gave her medical history of her 1995 accident and injury to her left foot. Ms. Busque was experiencing some allodynia, swelling, and right-lower-extremity neuropathy. Dr. Huh diagnosed Ms. Busque with RSD of her left lower extremity during this 16 December 1999 visit.

On 1 February 2000, Ms. Busque saw Dr. Mark Easley, an orthopaedic surgeon, complaining of right foot pain. Dr. Easley diagnosed Ms. Busque with atypical plantar fasciitis. On 15 February 2000, Ms. Busque returned to Dr. Huh; she was experiencing worse diffuse tenderness in her right foot than in her left. She had no symptoms of RSD at this visit other than diffuse tenderness. On 28 May 2001, Ms. Busque was seen by Dr. Huh's physician's assistant, Ms. Taylor. After the visit with Ms. Taylor, Ms. Busque did not return to Dr. Huh's office until 16 June 2005.

Ms. Busque began working for defendant Mid-America as a part-time leasing consultant on 10 August 2002. Her duties included answering the telephone, showing apartments, and preparing paperwork for leases. She worked thirty hours or more per week.

On 3 October 2002, Ms. Busque visited Dr. Cara Siegel at Raleigh Orthopaedic Clinic with complaints of swelling, constant pain, numbness, and tingling in her left foot after an alleged work-related injury which she told Dr. Siegel had occurred in February 2002 when she walked into a water meter while working for a previous employer. Ms. Busque informed Dr. Siegel that she had not previously had any problems with her left foot. Dr. Siegel observed no swelling and noted that Ms. Busque's left foot experienced the full range of motion. X-rays revealed no fractures, but Dr. Siegel noted the possibility of degenerative changes in Ms. Busque's foot. Dr. Siegel diagnosed chronic foot pain with mild degenerative changes. On 28 October 2002, Ms. Busque returned to see Dr. Siegel with concerns about venous supply and

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swelling in her leg. Dr. Siegel reiterated that her examination did not show any swelling.

On 18 January 2003, the first injury at issue in this case occurred. Ms. Busque tripped over high carpet, fell on the sharp point of her cane, and injured her left calf and ankle, causing a large knot to appear on her left leg. On 23 January 2003, Ms. Busque filed a Form 18, notifying Mid-America of the fall. In that form, she claimed she "fell walking to my desk—my foot I think turned." On that same day, she went to Doctors' Urgent Care Centre. She complained of left leg pain and a contusion on her right leg. She reported a history of torn ligaments in her left ankle and complained of numbness in her left ankle and toes. The exam revealed that she had full range of motion and no sensory deficit.

Ms. Busque returned to Doctors' Urgent Care Centre on 1 February 2003 for a re-check. She reported that she woke up with left leg pain and was concerned about a blood clot. She was diagnosed with leg strain and instructed to take anti-inflammatory and muscle relaxant medications: Celebrex, Skelaxin, and Flexeril. She was re-checked on 7 February 2003 and 19 February 2003. On 25 February 2005, Ms. Busque called to report that her circulation did not feel right and that her pain was so bad that she needed pain medication, not anti-inflammatory medication. She was referred to Raleigh Orthopaedic Clinic.

Ms. Busque visited the Raleigh Orthopaedic Clinic on 3 March 2003. She filled out a questionnaire in which she reported that she had experienced swelling and throbbing since 20 January 2003. She reported that her whole left leg throbbed, but that she had less pain when she was resting. She reported that she had been seen for a similar problem by a pain clinic at Duke University in 1995. She did not report any aching, numbness, burning, or feeling the sensation of pins and needles or stabbing. Dr. Daniel Albright's physician's assistant, Tom Butler, examined Ms. Busque. She complained to Mr. Butler of left lower extremity pain circumferentially, but she did not inform him that she had pre-existing RSD. His examination did not reveal any signs of bruising, ecchymosis, hyperesthesia, swelling, color change, temperature change, trophic changes, or allodynia in either of her feet or legs. The lack of these symptoms is notable as they are all indicators of RSD and CRPS. Mr. Butler referred her to physical therapy.

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Ms. Busque returned to Raleigh Orthopaedic Clinic on 21 April 2003 and saw Dr. Albright. Ms. Busque complained of “vein bulging” and a sensation of vague weakness in her right ankle. She did not report to Dr. Albright that she had a pre-existing diagnosis of RSD. Dr. Albright’s examination did not reveal any signs of bruising, ecchymosis, hyperesthesia, swelling, color change, temperature change, trophic changes, or allodynia in either of Ms. Busque’s left or right feet or legs. Dr. Albright released Ms. Busque from his care with a diagnosis of left ankle strain, sprain, and contusion. He made no additional treatment recommendations and, noting that Ms. Busque did not suffer any impairment, he returned her to full-duty work with no restrictions. At his deposition, Dr. Albright opined that Ms. Busque did not have RSD when he saw her on 21 April 2003.

Following the 21 April 2003 appointment with Dr. Albright, defendants Mid-America and Wausau did not provide Ms. Busque with any additional medical treatment. Ms. Busque claims that Wausau adjuster John Lapore told her that additional medical treatment would be authorized if she could locate a physician indicating that she needed such treatment. However, Wassau’s file regarding Ms. Busque contains no notes indicating that she was told that additional medical treatment would be authorized. On 11 July 2003, John McClanahan, a claims case manager for Wausau, sent Ms. Busque a letter indicating that defendants would not cover any additional medical treatment. On 31 July 2003, Wausau issued the last check for Ms. Busque’s 18 January 2003 claim.

Eight months later, on 8 March 2004, Ms. Busque visited Dr. Lawrence Higgins, an orthopedic surgeon at Duke Sports Medicine Clinic. Dr. Higgins diagnosed a muscle contusion in her left leg. Ms. Busque alleges that she then contacted Wausau requesting permission to treat with Dr. Higgins and that her request was denied because she was told it was “too late” to request additional treatment at that point.

On 5 October 2004, Ms. Busque returned to Dr. Higgins complaining of left leg pain. Dr. Higgins indicated that her pain was of unclear etiology. On 20 December 2004, Ms. Busque saw board-certified internist Dr. Joan Jordon in order to establish a primary care relationship. Ms. Busque gave Dr. Jordon a history of RSD.

On or about 15 May 2005, Ms. Busque claims that she re-injured her left foot by walking up steps at work. She claims that after this injury, she developed pain in her left calf and believes she felt a blood vessel break in her ankle. She was examined by Dr. Higgins who did

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not see any visible broken blood vessel. She did not report the 15 May 2005 injury to Mid-America, nor did she file a claim with the Industrial Commission.

On 16 June 2005, four years after she had last been seen by Dr. Huh, Ms. Busque returned to see him. His examination revealed worsening left lower extremity pain, mild edema, and allodynia. On 19 August 2005, Dr. Huh diagnosed Ms. Busque with RSD/CRPS. Ms. Busque returned to see Dr. Huh on 4 January 2006, complaining of persistent swelling and tingling in her left foot. She had mild edema of her lower left extremity. At his deposition, Dr. Huh opined that, at the time of the 18 January 2003 fall, Ms. Busque already had pre-existing RSD and that the 18 January 2003 fall had materially aggravated that pre-existing RSD.

In February 2006, Ms. Busque became a marketing specialist for Mid-America. This required her to perform seventy-five marketing calls per week, which involved visiting potential customers and distributing literature. On 8 March 2006, Ms. Busque visited a podiatrist, Dr. Andrew Milner, complaining of right foot pain and walking more than usual with her new position. Dr. Milner diagnosed her with plantar fasciitis in her right foot and wrote her a return-to-work note requiring periods of rest and wearing athletic shoes. She was also prescribed stretches and massage. On 24 March 2006, Dr. Milner modified the note requiring shorter rest periods. At his deposition, Dr. Milner opined that plantar fasciitis is “very common” and is an “ordinary disease of life.” Dr. Milner also testified that a patient’s activity level is only one of several factors that can contribute to plantar fasciitis.

On 15 May 2006, Ms. Busque visited Dr. Jordon. She complained of some depression, anxiety, insomnia, and worry over being evicted from her apartment. She gave her a history of a May 2005 left foot injury which occurred while climbing stairs and a February 2006 injury which occurred while conducting marketing visits at businesses. She also gave a history of RSD and informed Dr. Jordon about the 1995 “freak” accident. She did not mention the 18 January 2003 injury. Dr. Jordon prescribed Xanax, referred Ms. Busque to a psychiatrist, and recommended follow up at a pain clinic. Ms. Busque again visited Dr. Jordon on 8 June 2006, complaining of a migraine. She was given medication and again referred for a psychiatric appointment. Dr. Jordon did not observe any of the objective hallmark symptoms that often accompany RSD. She has no opinion regarding a causative link between Ms. Busque’s allegations of worsening pain after her January 2003 injury and her anxiety.

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Ms. Busque visited Dr. Huh again on 13 September 2006, complaining that her pain had spread to her left hand. Dr. Huh felt that Ms. Busque had CRPS in her left foot which had spread to her left hand. Ms. Busque returned to Dr. Huh on 26 March 2007 and 16 May 2007. She was prescribed physical therapy and medication; however, she reported that she could not tolerate the prescribed medications and so discontinued taking them. Her pain continued. Dr. Huh opined that conservative treatment is often not effective in RSD patients and that the drugs used for conservative treatment have unpleasant side effects.

At his deposition, Dr. Huh explained that RSD is “basically a pain coming from the nerve,” which can be thought of as a “short-circuited” “electrical wire” misfiring and causing “spontaneous pain.” He further explained that he diagnosed Ms. Busque with RSD based on her history and his examination, but without objective tests such as X-rays, bone scans, or MRIs, as those tests cause more pain for RSD patients. He explained that in Ms. Busque’s case, he documented allodynia (where a patient is unusually sensitive to a light touch) based on her subjective reporting of her response. He also documented swelling; however, he failed to note and was unable to recall at his deposition whether that swelling was mild, moderate, or severe.

In May 2007, Dr. Huh recommended that Ms. Busque might benefit from a surgically implanted spinal cord stimulator which he felt was “highly effective” in treating “th[at] type of pain.” He recommended that she have a one week trial of this treatment and then, if she reported a 50% or more improvement in her pain relief, she would be a candidate for a permanent device.

Ms. Busque returned to see Dr. Milner on 18 June 2007. Dr. Milner noted that Ms. Busque did not exhibit symptoms of RSD. Instead, Dr. Milner diagnosed Ms. Busque with chronic plantar fasciitis and prescribed that she wear “New Balance” athletic shoes.

That same day, on 18 July 2007, Ms. Busque submitted a Form 33 request that her claim be assigned for a hearing, alleging that she had developed “RSD and other health conditions as a result of the accident and [that she] requires additional medical treatment.” Specifically, Ms. Busque claims that the plantar fasciitis reoccurrence diagnosed by Dr. Milner on 8 March 2006 was caused by “excessive walking over the course of several days” as was required by her February 2006 change in position at Mid-America. She furthermore alleged that this aggravated her RSD and contributed to her depression.

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Ms. Busque's claim for further medical treatment arising out of the 18 January 2003 accident (Industrial Commission File No. 570691) and her claim for her plantar fasciitis reoccurrence diagnosed on 8 March 2006 (Industrial Commission File No. 615291) were consolidated for a hearing before the Industrial Commission on 31 July 2007. Defendants filed a Form 33R Response on 23 October 2007 and an amended Form 33R on 20 December 2007, denying Ms. Busque's claims, disputing the nature and extent of her injuries, contending that her alleged RSD is not a consequence of the 18 January 2003 injury, and asserting that her claim is barred by the statute of limitations and other statutory bars.

A hearing was held before Chief Deputy Commissioner Wanda Blanche Taylor on 5 June 2008. Ms. Busque testified extensively. Additionally, Wausau team manager Courtney Daniel Barnes testified concerning Wausau's policy to document completely all conversations between Wausau's employees and claimants. Linda Edwards and Phillip Boatwright, both property managers at Mid-America who supervised Ms. Busque, as well as Jackie Melnick, Mid-America's regional director, testified about Ms. Busque's job responsibilities at Mid-America and the accommodations that Ms. Busque received at the recommendation of Dr. Milner.

Additionally, the Commission considered a number of depositions. Among those were several of the doctors who had seen Ms. Busque as well as Dr. Michael Kerzner, a board-certified podiatrist who conducted a review of Ms. Busque's medical records. Dr. Kerzner opined that Ms. Busque does not have RSD. Furthermore, he opined that, based on medical records, her job description, the hours worked, and the level of required activity, Ms. Busque's suspected plantar fasciitis is not directly related to her job.

On 29 April 2009, Deputy Commissioner Taylor filed an Opinion and Award denying Ms. Busque's claims for additional benefits for her 18 January 2003 injury and for her recurrence of plantar fasciitis on or about 8 March 2006 and awarding Ms. Busque a second opinion evaluating her "left ankle strain/sprain/contusion" from the 18 January 2003 fall.

All parties appealed to the Full Industrial Commission. In an Opinion and Award dated 10 December 2009, the Commission confirmed the conclusions of Deputy Commissioner Taylor denying Ms. Busque's claim for additional benefits for her 18 January 2003 injury and for her alleged reoccurrence of her plantar fasciitis on or around

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8 March 2006. The Commission found, given the fact that Dr. Huh was the only doctor of the many that Ms. Busque visited who diagnosed her with RSD/CRPS, that his opinion that Ms. Busque has RSD and that it was causally related to the 18 January 2003 injury warranted little weight. The Commission concluded that Ms. Busque had failed to establish by the greater weight of the evidence that she had RSD/CRPS. It also concluded that the compensable 18 January 2003 fall had resulted only in a left ankle strain/sprain/contusion, caused Ms. Busque to miss no days of work, and required no medical treatment after her release from Dr. Albright on 21 April 2003. Furthermore, the Commission concluded that Ms. Busque's pre-existing plantar fasciitis was not aggravated by her job. The Commission concluded that Ms. Busque's anxiety and depression were not caused by or significantly contributed to by her 18 January 2003 left ankle strain/sprain/contusion.

The Commission also ordered that defendants provide a second opinion evaluation and rating of the percentage of permanent partial disability of plaintiff's left ankle resulting from the 18 January 2003 incident. Finally, the Commission ordered that defendants pay the costs of the proceedings.

## I.

Plaintiff's Appeal

[1] Ms. Busque argues the Commission erred by finding that she failed to establish that she has RSD/CRPS and by not determining that the 18 January 2003 fall materially aggravated her pre-existing RSD. Ms. Busque alleges that as a result the Commission erred in denying her claim for additional medical compensation. We disagree. The Commission made numerous findings of fact, which were amply supported by the record, regarding a lack of evidence supporting the conclusion that Ms. Busque did not have RSD.

An appellate court's review of an Opinion and Award of the North Carolina Industrial Commission is limited to a determination of whether there was any competent evidence before the Commission to support its findings of fact and whether those findings support the Commission's conclusions of law. *E.g., Faison v. Allen Canning Co.*, 163 N.C. App. 755, 757, 594 S.E.2d 446, 448 (2004). If supported by competent evidence, the Commission's findings are conclusive even though evidence might also support contrary findings. *E.g., Jones v. Chandler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317

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(1995) (“The Commission’s findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them.”).

The Commission made numerous findings of fact, including that: Dr. Rozear had not diagnosed Ms. Busque with RSD when he saw her in 1998; she did not exhibit symptoms of RSD when she was examined by Mr. Butler and Dr. Albright at Raleigh Orthopedic Clinic in 2003; Dr. Jordon did not observe any objective hallmarks that usually accompany RSD in May and June of 2006; Dr. Milner did not observe any objective symptoms of RSD when he examined Ms. Busque in 2007, and opined that, while she suffered from chronic plantar fasciitis, her employment was not a significant contributing factor; and Dr. Kerzner reviewed Ms. Busque’s medical records and was of the opinion that she did not have RSD and that her suspected plantar fasciitis is a common, ordinary disease of life and was not directly related to her employment. The Commission also found:

49. None of the numerous doctors consulted by plaintiff, with the exception of Dr. Huh, have diagnosed plaintiff with RSD/CRPS. Dr. Huh, although he diagnosed plaintiff with RSD/CRPS, did not observe any of the hallmark conditions which are found with RSD/CRPS except mild intermittent swelling and allodynia.

We find plenary evidence to support the Commission’s findings, in the testimony of each of the physicians who examined Ms. Busque, and in the testimony of Dr. Kerzner, who has treated numerous RSD cases and lectured extensively on RSD and reviewed all of Ms. Busque’s medical records and her job description.

Ms. Busque appears to argue, however, that the Commission should have only given credence to Dr. Huh’s opinion as to whether or not she had RSD. In advancing this argument, however, Ms. Busque appears to misapprehend our standard of review. This Court’s “‘duty goes no further than to determine whether the record contains any evidence tending to support the finding.’” *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). Additionally, the Commission is entitled to assign more weight and credibility to the testimony of some witnesses as it sees fit. *Dolbow v. Holland Indus.*, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983). Moreover, contrary to Ms. Busque’s assertion that the Commission further erred when it made no finding as to whether her RSD was aggravated by her 18 January 2003 fall, it would have been nonsensical

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for the Commission to make such a specific finding with respect to a condition from which it had already concluded she did not suffer.

We hold the Commission's findings fully support its conclusion of law that:

2. Plaintiff failed to prove by the greater weight of the evidence that she has CRPS/RSD.

Consequently, we affirm the Commission's denial of additional benefits related to her 18 January 2003 compensable injury.

## II.

Defendants' Appeal

[2] In their appeal, defendants challenge the Commission's conclusion of law and subsequent award entitling Ms. Busque to "a second opinion evaluation and rating of the percentage of permanent partial disability of plaintiff's left ankle resulting from the compensable strain/sprain/contusion on January 18, 2003." Defendants argue the award is not supported by the Commission's findings of fact or by the law. They also argue that Ms. Busque's claim is barred by both the two year statute of limitations and by laches. Ms. Busque contends that neither the statute of limitations nor laches bars the award entitling her to a second opinion. Furthermore, she argues that defendants should be equitably estopped from asserting any applicable time limitations. We agree with defendants that the statute of limitations bars the award of a second opinion to Ms. Busque.

Conclusions of law are reviewed *de novo*. *E.g., Ramsey v. S. Indus. Constructors Inc.*, 178 N.C. App. 25, 30, 630 S.E.2d 681, 685, *disc. review denied*, 361 N.C. 168, 639 S.E.2d 652 (2006). N.C. G.S. § 97-25.1 (2009) details this two year statute of limitations and plainly bars Ms. Busque's further recovery. The statute states:

The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, either: (i) the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation. If the Commission determines that there is a substantial risk of the

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necessity of future medical compensation, the Commission shall provide by order for payment of future necessary medical compensation.

N.C. Gen. Stat. § 97-25.1 (2009). Applying the statute to the present case, the “last payment of medical or indemnity compensation” for the 18 January 2003 fall was a check issued to Ms. Busque dated 31 July 2003. Ms. Busque’s application for additional medical compensation was not filed until 18 July 2007—more than two years beyond 31 July 2003. Thus, Ms. Busque’s right to medical compensation for that injury has terminated.

Ms. Busque challenges this straight-forward reading of N.C.G.S. § 97-25.1. She argues that the term “last payment of . . . compensation” can only refer to a “final award.” She argues that there is a distinction between her claim and other claims where the statute of limitation properly bars recovery because she claims that she faced continuing denial of compensability. We disagree. In fact, we note that there was no “continuing denial” as Ms. Busque filed her only request for coverage on 18 July 2007—more than two years after she received the 11 July 2003 letter from defendant Wausau’s claims adjuster, Mr. McClanahan, informing her that defendants would not authorize any additional medical treatment and the 31 July 2003 check from defendants. During that time period, Ms. Busque did not make *any* filing with the Industrial Commission requesting additional benefits.

Ms. Busque also tries to overcome the statute of limitations bar by arguing that defendants are equitably estopped from asserting the statute of limitations defense. She bases this argument upon her contention that she was advised by a representative of defendants that she would be provided additional medical treatment for her injury should she locate a physician indicating that she needed it. The Commission, however, found that no one at Wausau told plaintiff that additional medical treatment beyond her 21 April 2003 appointment with Dr. Albright would be authorized. This finding is supported by Wausau’s “Claim Notes,” which do not indicate that anyone at Wausau told Ms. Busque that additional medical treatment beyond the 21 April 2003 appointment with Dr. Albright would be authorized and the testimony about Wausau’s policy of thoroughly documenting all conversations with claimants.

Because we hold that the Commission improperly ordered that Ms. Busque was entitled to a second opinion, we reverse that portion of the Order.

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[209 N.C. App. 708 (2011)]

Plaintiff's Appeal—Affirmed.

Defendants' Appeal—Reversed.

Judges McGEE and ERVIN concur.

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STATE OF NORTH CAROLINA v. MORRIS CLEM PATTERSON

No. COA10-538

(Filed 1 March 2011)

**1. Evidence— exhibit—chemical analysis of blood—expert testimony**

The trial court did not commit plain error by admitting into evidence the results of the chemical analysis of defendant's blood and an expert's testimony based on those results. Defendant did not allege that the test, indicating that defendant had a blood alcohol concentration of 0.14 more than three hours after the accident, was improperly administered. The fact that three hours had passed went to the weight to be given to the test rather than its admissibility.

**2. Motor Vehicles— driving while impaired—second-degree murder—felony serious injury by vehicle—legal impairment**

The trial court did not err by denying defendant's motion to dismiss the charges of second-degree murder, felony serious injury by vehicle, and driving while impaired based on alleged insufficient evidence that defendant was legally impaired at any relevant time after driving. In addition to other evidence, the State showed that defendant was under the influence of an impairing substance at the time of the accident based on a chemical analysis of his blood, defendant admitted consuming as many as five or six beers, and defendant's speed exceeded 100 miles per hour, and defendant failed to use his brakes or make any attempt to avoid the collision.

Appeal by Defendant from judgments entered 31 July 2009 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 3 November 2010.

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[209 N.C. App. 708 (2011)]

*Attorney General Roy Cooper, by Assistant Attorney General William P. Hart, Jr., for the State.*

*Anne Bleyman for Defendant.*

STEPHENS, Judge.

*I. Procedural History*

Defendant was indicted for second-degree murder, two counts of felony serious injury by vehicle, reckless driving, driving while license revoked, operation of motor vehicle without financial responsibility, and driving while impaired. The State dismissed the charge of operation of a motor vehicle without financial responsibility.

The case came on for trial during the 27 July 2009 Criminal Session of Randolph County Superior Court, the Honorable V. Bradford Long presiding. On 31 July 2009, the jury returned verdicts finding Defendant guilty of involuntary manslaughter, two counts of felony serious injury by vehicle, reckless driving, driving while license revoked, and driving while impaired. Defendant was sentenced to the following: three consecutive terms of 16 to 20 months in prison for the involuntary manslaughter and felony serious injury by vehicle convictions; 120 days in prison for the driving while license revoked conviction, to be served consecutive to the sentence for the second felony serious injury by vehicle conviction; and 60 days in prison for the reckless driving to endanger conviction, to be served consecutive to the sentence for the driving while license revoked conviction. Judge Long arrested judgment on the driving while impaired conviction.

Defendant appeals.

*II. Factual Background*

The State's evidence at trial tended to show the following: At approximately 9:30 p.m. on 14 June 2007, Defendant Morris Clem Patterson was driving a burgundy BMW along State Highway 49 between Ramseur and Liberty, North Carolina when his vehicle collided with a minivan driven by Micaela Jaramillo Navarette, who was attempting to make a left turn across Defendant's lane of travel. Jeffrie Lynn Scotton, a passenger in the right front seat of Defendant's vehicle, died immediately from injuries sustained in the collision. Defendant and Roger Vinson Marsh, a passenger in the back seat of Defendant's vehicle, suffered significant injuries requiring hospitalization. Navarette also sustained significant injuries requiring hospitalization.

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James L. Brown, an off duty emergency medical technician, was one of the first individuals to arrive at the accident scene. Brown immediately called 9-1-1 and approached the vehicles to assess the situation. Shortly thereafter, emergency personnel arrived, including Trooper William Anthony Dees of the State Highway Patrol; Dustin Brown, a firefighter with the Franklinville Fire Department; and Sabrina Elliott of Randolph County Emergency Medical Services (“EMS”).

Dees testified that he observed Defendant lying beside the driver's side door of the BMW and approached him to ask what had happened. Defendant looked up and replied, “I wasn't driving.” Dees detected an odor of alcohol coming from Defendant and observed that Defendant's eyes were bloodshot, which he testified is a possible sign of impairment. An unopened can of beer was in the passenger compartment of the vehicle and a case of unopened beer was in the trunk.

Brown, who helped stabilize Defendant with a cervical collar and a spine board, testified that he detected a heavy odor of alcohol coming from Defendant and heard Defendant repeatedly state, “I wasn't driving.” Elliott, who transported Defendant and Marsh to Moses Cone Hospital, testified that Defendant was “combative,” smelled of alcohol, and stated he had consumed five beers that day. Trooper Joshua Smith with the State Highway Patrol testified that, at approximately 12:44 a.m. on 15 June 2007, he directed hospital staff to take a sample of blood from Defendant with Defendant's consent. Smith detected a strong odor of alcohol from Defendant.

Special Agent Linda Farren, a chemical analyst with the State Bureau of Investigation, analyzed Defendant's blood sample and testified, without objection, that Defendant had a blood alcohol concentration (“BAC”) of 0.14 at the time his blood was drawn. The results of the blood test were admitted into evidence without objection.

Paul L. Glover, branch head and research scientist for the Forensic Tests for Alcohol under the Department of Health and Human Services, was tendered without objection as an expert witness in blood alcohol testing, blood alcohol physiology, and blood alcohol pharmacology. Glover testified, without objection, that he performed retrograde extrapolation based on the blood test results, the time of the accident, the time the blood sample was drawn from Defendant, and the average value for the rate of elimination of alcohol from humans to estimate that Defendant had a BAC of 0.19 at the time of the accident.

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Dees testified further that he observed no tire marks at the scene of the accident, indicating that Defendant had not applied his brakes before the collision. Brian Palmiter, also a trooper with the State Highway Patrol, was tendered without objection as an expert in accident reconstruction. He testified that, in his opinion, Defendant's vehicle was traveling at a speed of 103 miles per hour when it collided with the minivan. Similar testimony was offered by Marsh, who observed the speedometer in Defendant's vehicle at or above 100 miles per hour immediately before the collision and did not notice Defendant attempt to slow down or apply his brakes in reaction to the minivan turning ahead of him.

Defendant testified on his own behalf. According to Defendant, he had consumed some beer before 5:00 a.m. on 14 June 2007 and two to three beers between 3:00 p.m. and 6:00 p.m. that day. Defendant and Scotton were at the residence of Defendant's cousin when Scotton received a phone call indicating that dinner was ready for him at a residence in the Goldston Trailer Park. Defendant drove Scotton and Marsh, an acquaintance who asked for a ride, along Highway 49 in the direction of the Goldston Trailer Park. At a certain point, Defendant looked over at Scotton and then into his rearview mirror. When he looked forward again, he observed the minivan turning just ahead. According to Defendant's testimony, he did not feel impaired at the time, was traveling around 50 miles per hour, and slammed on his brakes the moment he noticed the minivan turn across his lane of travel.

*III. Discussion**A. Blood Alcohol Test Results*

[1] Defendant first argues that the trial court committed plain error by admitting into evidence State's exhibit number 19, the results of the chemical analysis of Defendant's blood, and Mr. Glover's testimony based on the results. Specifically, Defendant argues that the probative value of the results and the testimony based on the results was substantially outweighed by undue prejudice. We disagree.

Ordinarily, a trial court's decision to admit or exclude evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 40<sup>1</sup> is reviewed for an abuse

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1. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2009).

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of discretion. *State v. Matheson*, 110 N.C. App. 577, 583, 430 S.E.2d 429, 432-33 (1993). However, Defendant failed to object to the evidence at trial and is thus limited to plain error review. N.C. R. App. P. 10(b)(2), (c)(4). “Reversal for plain error is only appropriate where the error is so fundamental that it undermines the fairness of the trial, or where it had a probable impact on the guilty verdict.” *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240 (2002).

In order to prove Defendant committed the offense of driving while impaired, the State was required to prove beyond a reasonable doubt that Defendant was driving his vehicle on a State highway:

- (1) While under the influence of an impairing substance; or
- (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person’s alcohol concentration; or
- (3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

N.C. Gen. Stat. § 20-138.1(a) (2009).

Defendant argues that the blood sample taken from him approximately three hours after the accident was not taken “at any relevant time[,]” as required by N.C. Gen. Stat. § 20-138.1(a)(2) and, thus, was inadmissible. We disagree.

In *State v. George*, 77 N.C. App. 470, 336 S.E.2d 93 (1985), *appeal dismissed and disc. review denied*, 316 N.C. 197, 341 S.E.2d 581 (1986), defendant argued that a Breathalyzer test for alcohol content, administered three hours and forty five-minutes after driving, was not administered at a relevant time after driving and, thus, the result of the test was inadmissible. This Court held that the fact that more than three hours had passed from the time defendant operated the motor vehicle until the Breathalyzer test was administered goes to the weight to be given the result of the test, rather than to its admissibility. *Id.* at 473, 336 S.E.2d at 95. Accordingly, this Court held that the Breathalyzer evidence was properly admitted. *Id.*

Likewise, in *State v. Oldham*, 10 N.C. App. 172, 177 S.E.2d 769 (1970), defendant contended that it was error to admit the result of a blood alcohol test, indicating that defendant had a blood alcohol content of .16, administered approximately two hours and twelve minutes after he was involved in an automobile accident. Defendant con-

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tended that the test was not timely made and, thus, was without probative value. Defendant admitted that the test was properly administered and there was ample evidence that defendant did not consume any alcohol between the time of the accident and the time the test was administered. This Court held that “[u]nder all the circumstances of this case[,] . . . the result of the test had probative value and was properly admitted into evidence.” *Id.* at 173, 177 S.E.2d at 770.

As in *Oldham*, the evidence in this case tended to show that Defendant did not consume any alcohol between the time of the accident and the time the blood sample was drawn from Defendant, approximately three hours after the accident. Moreover, Defendant does not allege that the test, indicating that Defendant still had a BAC of .14 more than three hours after the accident, was improperly administered. Although Defendant asserts that “the potential rate of error increase[s] as time’ passes and that the State “makes no mention of other intervening events that could have compromised the blood sample during this over three hour period of time[,]” the fact that approximately three hours had passed from the time Defendant operated the motor vehicle until the blood test was given goes to the weight to be given the result of the test, rather than to its admissibility. *George*, 77 N.C. App. at 473, 336 S.E.2d at 95. Under all the circumstances of this case, we hold that the result of the test had probative value and the trial court did not err in admitting it into evidence.

Defendant cites this Court’s unpublished opinion in *State v. Verdicanno*, No. COA99-1086 (N.C. App. April 18, 2000), to support his contention that “a delay of more than three hours renders a blood draw too remote in time to be admissible.” Defendant misinterprets this Court’s holding in that case.

In *Verdicanno*, the case was tried “solely on the basis of [the] appreciable impairment” prong of N.C. Gen. Stat. § 20-138.1, without reference to the .08 prong. *Verdicanno*, slip op. at 3. The trial court thus excluded as irrelevant the result of a blood alcohol test administered to defendant approximately three and a half hours after his arrest for suspected driving while impaired. This Court held that it was within the trial court’s discretion to exclude the blood test evidence by weighing its slight probative value of defendant’s appreciable impairment with its tendency to confuse the issues, and, thus, the trial court did not err in finding that “the long delay rendered the blood test too remote in time from defendant’s arrest to be admissible.” *Id.* at 6.

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Unlike in *Verdicanno*, Defendant was not tried solely on the “appreciable impairment” prong of N.C. Gen. Stat. § 20-138.1(a), and Defendant’s blood alcohol concentration at the time of the arrest was at issue. Accordingly, the blood test evidence was relevant to show Defendant’s blood alcohol content. We conclude that the trial court did not err in admitting it into evidence.

Based on the test result indicating that Defendant had a BAC of .14 approximately three hours after the accident, Mr. Glover performed retrograde extrapolation and formed the opinion that Defendant’s alcohol concentration was .19 at the time of the collision. Defendant argues that it was error to admit Mr. Glover’s opinion testimony based on the “inadmissible laboratory report.” However, in light of our holding that the trial court did not err in admitting the report, Defendant’s argument is overruled.

*B. Motions to Dismiss*

[2] Defendant next argues that the trial court erred in denying his motions to dismiss the charges of second-degree murder, felony serious injury by vehicle, and driving while impaired because there was insufficient evidence that Defendant was “legally impaired at any relevant time after [] driving.” We disagree.

In evaluating a motion to dismiss for insufficiency of the evidence, the task of a reviewing court is to

examine the evidence adduced at trial in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime. Evidence is “substantial” if a reasonable person would consider it sufficient to support the conclusion that the essential element exists.

*State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). The question is “whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* (citation and quotation marks omitted). Evidence sufficient “to carry a case to the jury” must be more than a “mere scintilla” and must generally be “any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction[.]” *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (citation and quotation marks omitted). The court does not weigh the evidence and any discrepancies or contradictions in the evidence are to be resolved by the jury. *Id.* at 67, 296 S.E.2d at 652.

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“Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation.” *State v. Snyder*, 311 N.C. 391, 393, 317 S.E.2d 394, 395 (1984). Reckless conduct during the course of driving while impaired can fulfill the malice element necessary to sustain a conviction of second-degree murder. *Id.* at 394, 317 S.E.2d at 396.

Additionally, a person commits the offense of felony serious injury by vehicle if:

- (1) The person unintentionally causes serious injury to another person,
- (2) The person was engaged in the offense of impaired driving under [N.C. Gen. Stat. §] 20-138.1 or [N.C. Gen. Stat. §] 20-138.2,<sup>2</sup> and
- (3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the serious injury.

N.C. Gen. Stat. § 20-141.4(a3) (2009).

Furthermore, as stated *supra*, a person commits the offense of driving while impaired if the person was driving his vehicle on a State highway:

- (1) While under the influence of an impairing substance; or
- (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. . . ; or
- (3) With any amount of a Schedule I controlled substance, as listed in [N.C. Gen. Stat. §] 90-89, or its metabolites in his blood or urine.

N.C. Gen. Stat. § 20-138.1(a).

At trial, the State presented the following evidence tending to show that Defendant was under the influence of an impairing substance at the time the accident occurred: Based on the chemical analysis of the blood taken from Defendant after the accident, Defendant had a BAC of 0.14 at a relevant time after driving. This result was further extrapolated through expert testimony to estimate that Defendant had a blood alcohol content of 0.19 at the time of the accident.

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2. N.C. Gen. Stat. § 20-138.2 contains the elements of the offense of impaired driving in a commercial vehicle.

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Additionally, Defendant admitted having consumed as many as five or six beers on the date of the accident. Four witnesses testified that they detected a strong odor of alcohol emanating from Defendant immediately following the accident. Evidence was also presented that Defendant had bloodshot eyes and was combative with emergency personnel immediately after the accident.

Finally, Defendant's speed exceeded 100 miles per hour and Defendant failed to use his brakes or make any attempt to avoid the collision.

We conclude that the foregoing evidence was abundantly sufficient to show that Defendant was under the influence of an impairing substance at the time of the accident. Accordingly, the trial court did not err in denying Defendant's motions to dismiss the charges of second-degree murder, felony serious injury by vehicle, and driving while impaired.

Defendant received a fair trial, free of error.

NO ERROR.

Judges STEELMAN and HUNTER, JR. concur.

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K2 ASIA VENTURES, BEN C. BROOCKS, AND JAMES G. J. CROW, PLAINTIFFS V.  
ROBERT TROTA, *ET AL.*, DEFENDANTS

No. COA10-779

(Filed 1 March 2011)

**Appeal and Error—interlocutory orders and appeals—voluntary submission to North Carolina jurisdiction—motion to compel depositions—bound to participate in jurisdictional discovery**

Defendants' appeal from an interlocutory discovery order granting plaintiffs' motion to compel depositions was dismissed. Defendants had voluntarily submitted to North Carolina jurisdiction to decide the issue of personal jurisdiction in the action, and thus, were bound to participate in jurisdictional discovery the trial court ordered. In this case, the order's requirement that defendants appear in California for depositions during jurisdic-

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tional discovery did not burden defendants' substantial right to due process and did not warrant immediate appeal.

Appeal by Defendants Robert Trota, Carolyn T. Salud, Cristina T. Garcia, Jim Fuentabella, and Sharon Fuentabella from order entered 19 April 2010 by Judge James M. Webb in Forsyth County Superior Court. Heard in the Court of Appeals 15 December 2010.

*Watts Guerra Craft LLP, by Christopher V. Goodpastor, and Blanco Tackaberry & Matamoros, P.A., by Elliot Fus and Peter J. Juran, for Plaintiffs-Appellees.*

*Bell, Davis & Pitt, P.A., by William K. Davis, Alan M. Ruley, and Bradley C. Friesen, for Defendants-Appellants.*

STEPHENS, Judge.

In April 2009, Plaintiffs filed a complaint in Forsyth County, North Carolina against Defendants, asserting various causes of action arising out of alleged breaches of alleged agreements between Plaintiffs and the various Defendants. Defendants all filed motions to dismiss Plaintiffs' action based on the court's alleged lack of personal jurisdiction. It appears from the records and briefs that Defendants agreed to postpone the hearing on their motion to allow Plaintiffs to conduct limited discovery on the issue of personal jurisdiction.

After serving and receiving Defendants' responses to interrogatories, requests for production of documents, and requests for admissions, Plaintiffs sought to supplement their jurisdictional discovery by deposing Defendants Robert Trota, Carolyn T. Salud, Cristina T. Garcia, Jim Fuentabella, and Sharon Fuentabella ("Appellants"). Appellants, who are all residents of the Philippines, objected to the depositions and moved the court for a protective order. Plaintiffs filed an amended notice of depositions, but, when they were unable to secure Appellants' appearance at the depositions, Plaintiffs filed their 10 March 2010 motion to compel depositions.

Following a 5 April 2010 hearing on the discovery motions, Judge James M. Webb entered the 19 April 2010 order ("Order") granting Plaintiffs' motion to compel depositions and denying Appellants' motion for a protective order. The trial court ordered Appellants to appear for depositions in Glendale, California, the city of the headquarters of Defendant Max's of Manila, Inc., a corporation in which three of the Appellants are directors or officers. On 20 April 2010, Appellants appealed the trial court's Order.

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On appeal, Appellants challenge the trial court's authority to (1) order Appellants to appear for depositions during the jurisdictional discovery phase, and (2) order Appellants to appear in California—"a distance of over 7,000 miles" from their residences in the Philippines—for their depositions. However, the threshold, and ultimately dispositive, issue is whether appeal of the trial court's Order is proper at this time.

What appears to be the only undisputed issue in this contentious action is that the trial court's Order is interlocutory. As such, the Order is only immediately appealable if it has been certified by the trial court (which it has not) or if it affects a substantial right of Appellants. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2009); N.C. Gen. Stat. § 1-277(a) (2009) ("An appeal may be taken from every judicial order or determination of a judge of a superior or district court . . . which affects a substantial right claimed in any action or proceeding[.]"). North Carolina Courts have developed the following "two-part test" to determine whether an interlocutory order may be appealed because of its effect on a party's substantial right: (1) the right itself must be substantial and (2) the "deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citing *Wachovia Realty Investments v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977)).

As their first allegedly substantial right suffering deprivation by the terms of the Order, Appellants present their "right to be deposed only in the counties in which they reside." This right, Appellants argue, arises from North Carolina Civil Procedure Rule 30(b)(1), which Appellants contend "mandates that a nonresident defendant may be deposed *only* in the county in which he or she resides." Appellants claim the order deprives them of their Rule 30(b)(1) "right" to be deposed in the Philippines and is immediately appealable. Assuming, without deciding, that Rule 30(b)(1) grants a party the right to be deposed only in the county in which he resides, and assuming that the Order violates this right, the issue is whether violation of this particular right warrants immediate appeal.

As a general rule, interlocutory discovery orders are not immediately appealable. *See, e.g., Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 447, 271 S.E.2d 522, 523 (1980) ("It has been held that orders denying or allowing discovery are not appealable since they are interlocutory and do not affect a substantial right which would be lost if the ruling

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were not reviewed before final judgment.”). Indeed, a cursory inspection of North Carolina case law reveals that orders of the trial court that allegedly violate discovery rules, or other rules of civil procedure, are rarely appropriate for immediate appeal. *Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982) (appellant not entitled to immediate appeal of trial court’s adverse ruling on motions to dismiss based on insufficiency of service and insufficiency of process); *Green v. Maness*, 69 N.C. App. 403, 316 S.E.2d 911 (1984) (noting in syllabus that this Court had previously dismissed as interlocutory an immediate appeal from discovery order that appellant contended violated Rule of Civil Procedure 26(b)(4)(a)(2)); *Buchanan v. Rose*, 59 N.C. App. 351, 352, 296 S.E.2d 508, 509 (1982) (an order denying a motion to amend pleadings under Rule 15(a) is an interlocutory order and not immediately appealable); *Lazenby v. Godwin*, 49 N.C. App. 300, 300-01, 271 S.E.2d 69, 70 (1980) (“Plaintiffs attempt to appeal from a pretrial order entered pursuant to Rule 16 of the North Carolina Rules of Civil Procedure. The pretrial order is interlocutory and is not appealable.”). Therefore, it can safely be said, stated in Appellants’ terms, that while a rule of civil procedure may grant a party certain “rights,” not every violation of those “rights” is immediately appealable. The mere fact of a violation of a rule of civil procedure, without more, is insufficient to warrant immediate appeal.

However, Appellants argue that they should be entitled to immediately appeal this alleged violation because, in this case, their Rule 30(b)(1) “right” is a substantial one in that Appellants are “*foreign national* nonresident defendant[s] who will more than likely suffer travel demands exponentially more burdensome than domestic non-resident defendants.” We disagree.

This Court has held that avoiding the expenditure of time and money is not a substantial right justifying immediate appeal. *See Reid v. Cole*, 187 N.C. App. 261, 266-67, 652 S.E.2d 718, 721-22 (2007) (stating that “‘avoiding the time and expense of trial is not a substantial right justifying immediate appeal’”) (quoting *Lee v. Baxter*, 147 N.C. App. 517, 520, 556 S.E.2d 36, 38 (2001)); *see also Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) (“Interlocutory appeals that challenge only the financial repercussions of a separation or divorce generally have not been held to affect a substantial right.”). Because the time and money likely to be expended by Appellants as a result of the Order—possibly several days’ time and the cost of a trans-Pacific flight and motel expenses—cannot be more burdensome than the time and money expended in litigating an entire trial,

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and because “avoiding the time and expense of a trial is not a substantial right justifying immediate appeal[,]” *Reid*, 187 N.C. App. at 266-67, 652 S.E.2d at 721-22, we are unpersuaded by Appellants’ argument that violation of their Rule 30(b)(1) “right” is immediately appealable based on the potentially burdensome travel costs that Appellants may incur by complying with the Order.

We are likewise unpersuaded by Appellants’ argument that the Order’s violation of their Rule 30(b)(1) “right” is immediately appealable “for the same reason, based on the same substantial right, that orders on venue motions are immediately appealable.” While it is true that orders on motions for change of venue based on improper venue affect a substantial right and are immediately appealable, *see Hawley v. Hobgood*, 174 N.C. App. 606, 608, 622 S.E.2d 117, 119 (2005), we cannot conclude that the same right is affected when a party is forced to litigate in an improper venue as when a party is forced to appear for a deposition in an “improper” location. Further, any similarity between the two rights is completely overshadowed by the difference in magnitude of the burden on those rights: a decision setting venue covers the duration of the judicial process while a decision setting the location of a deposition covers only the much shorter duration of the depositions (in this case Plaintiffs seek one day of deposition per Appellant). Accordingly, we cannot conclude that the Order setting the location of the depositions is immediately appealable “for the same reason” that orders on venue motions are immediately appealable.

Because interlocutory discovery orders are generally not appealable, *Dworsky*, 49 N.C. App. at 447, 271 S.E.2d at 523, and because Appellants present nothing beyond their allegation of a violation of Rule 30(b)(1) to indicate a substantial right that will be irreparably harmed absent immediate appeal, we conclude that Appellants are not entitled to immediate review of the Order based on its alleged violation of Rule 30(b)(1).

Appellants further contend that the Order is immediately appealable based on its adverse affect on Appellants’ “substantial right to due process.” “[T]he Due Process Clause [does] not permit a State to make a binding judgment against a person with whom the State [has] no contacts, ties, or relations.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 806-07, 86 L. Ed. 2d 628, 638 (1985) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95 (1945)). This due process right is an individual right that protects a defendant “from the travail of defending in a distant forum, unless the defendant’s contacts with the forum make it just to force him to defend there.” *Id.*

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The twin bases upon which Appellants rest their claim that the Order adversely affects their due process rights are (1) that the Order compels Appellants to appear for depositions unlimited in scope and (2) that the Order requires Appellants “to physically transport themselves thousands of miles to North America[.]”<sup>1</sup>

As for Appellants’ claim that the Order violates their due process rights by compelling them to appear for depositions unlimited in scope, we first note that the Order does not provide for an unlimited scope of the depositions. Although the Order does not explicitly state that the scope of the depositions is limited to issues of personal jurisdiction, from the context of the proceedings, as well as from the parties’ motions and arguments, it is obvious that the scope of the depositions is limited to the issue of personal jurisdiction.

Appellants state in their brief, and Plaintiffs do not contend otherwise, that Appellants have waived personal jurisdiction only to the limited extent of allowing North Carolina courts to determine the issue of personal jurisdiction. Further, all discovery served up to this point in the proceedings has been focused on the issue of personal jurisdiction.

In their memorandum in support of their motion, Plaintiffs asserted that the court “should grant Plaintiffs’ Motion to Compel, overrule [Appellants’] objections, and deny the Motion for Protective Order” on the ground that “Plaintiffs are entitled to depose [Appellants] to discover information relevant to Defendants’ Motions to Dismiss for Lack of Personal Jurisdiction.” Furthermore, at the motion hearing, Plaintiffs’ counsel asserted that “[a]ll [Plaintiffs are] asking is that we be entitled to ask questions to get real truthful and final answers to the factual questions regarding contacts with North Carolina that are raised in [discovery thus far].” Clearly, Plaintiffs contemplated that only the issue of depositions regarding personal jurisdiction was before the trial court.

Similarly, it appears that Appellants viewed the issue before the court as the propriety of depositions regarding personal jurisdiction:

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1. Appellants also contend that their “lawful right to move to dismiss the claims against them for lack of personal jurisdiction” will be foreclosed by their appearance at the depositions, which Appellants assert amounts to substantial participation in the action. Appellants’ contention, however, is long on supposition and conclusion, and short on argument and authority. We find no reason, and none is presented by Appellants, to conclude that Appellants’ right to move for dismissal based on lack of personal jurisdiction will somehow be foreclosed by their participation in the requested jurisdictional discovery.

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in their motion for a protective order, Appellants moved for a “protective order that their depositions for purposes of discovery about personal jurisdiction not be had.”

From the foregoing, it is clear that the only issue before the trial court was whether Plaintiffs may depose Appellants regarding issues relevant to the court’s determination of personal jurisdiction. Accordingly, we need not decide whether depositions of unlimited scope would violate Appellants’ due process rights.

The question, then, is simply whether the Order’s requirement that Appellants appear for depositions at all violates a due-process-protected interest of Appellants. Initially, we note that most federal courts leave the scope of jurisdictional discovery to the discretion of the trial judge and have no due-process qualms about subjecting an out-of-state defendant to depositions regarding jurisdictional discovery issues. *See Surpitski v. Hughes-Keenan Corp.*, 362 F.2d 254, 255 (1st Cir. 1966) (holding that plaintiff was entitled to take depositions in jurisdictional discovery); *Metcalfe v. Renaissance Marine, Inc.*, 566 F.3d 324, 336 (3d Cir. 2009) (noting its approval of the First Circuit’s jurisdictional discovery procedure, which allows for taking of depositions); *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1165 (5th Cir. 1985) (“The court may determine the [personal] jurisdictional issue by receiving affidavits, interrogatories, depositions, oral testimony, or any combination of the recognized methods of discovery.”); *Theunissen v. Matthews*, 935 F.2d 1454, 1465 (6th Cir. 1991) (court may permit discovery in aid of deciding Rule 12(b)(2) motion, and scope of such discovery is committed to district court’s sound discretion); *United States ex rel. Barko v. Halliburton Co.*, 2010 U.S. Dist. LEXIS 109630 (D.D.C. Oct. 14, 2010) (approving deposition in jurisdictional discovery); *Birnberg v. Milk St. Assocs., Ltd. P’ship*, 2002 U.S. Dist. LEXIS 9321 (N.D. Ill. May 24, 2002) (allowing depositions in jurisdictional discovery). Furthermore, as made clear by the United States Supreme Court, when a defendant voluntarily submits to the limited jurisdiction of a court for the purpose of challenging jurisdiction, “the defendant agrees to abide by that court’s determination on the issue of jurisdiction[,]” which determination “may include a variety of legal rules and presumptions.” *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706-07, 72 L. Ed. 2d 492, 504 (1982). Accordingly, a party may waive, to a limited extent, its protected interest in not being subject to the binding judgments of a court by submitting to that court for the purpose of obtaining a binding judg-

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ment on the issue of jurisdiction, and, in doing so, the party agrees to “abide by” the “legal rules and presumptions” that the forum court will use to determine the issue of jurisdiction. *See id.* All of this is simply to say that, in this case, Appellants voluntarily submitted the jurisdictional issue to the North Carolina General Court of Justice and, consequently, Appellants *ultimately* are bound by the North Carolina courts’ determination of personal jurisdiction and *immediately* are bound to abide by those legal rules governing the procedure to be followed in reaching that determination, including the North Carolina Rules of Civil Procedure.

Under the Rules, Plaintiffs are permitted to obtain by depositions discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” N.C. Gen. Stat. § 1A-1, Rule 26 (2009). Plaintiffs may also move the trial court to compel Appellants to answer questions in depositions. N.C. Gen. Stat. § 1A-1, Rule 37(a) (2009). Further, the trial court is permitted to exercise its control over discovery by ordering Appellants to submit to depositions requested by Plaintiffs. *See, e.g., Am. Tel. & Tel. Co. v. Griffin*, 39 N.C. App. 721, 727, 251 S.E.2d 885, 888 (1979) (“The administration of [the discovery] rules lies necessarily within the province of the trial courts.”). Accordingly, Appellants’ argument that their due process rights were violated when the trial court ordered Appellants to appear for depositions is unavailing. Because Appellants voluntarily submitted to North Carolina jurisdiction to decide the issue of personal jurisdiction in the action, they are bound to participate in what jurisdictional discovery the trial court orders.

This is not to say that, in the context of jurisdictional discovery, all discovery orders, so long as they comport with the rules of civil procedure, conclusively do not burden a defendant’s due process rights. Indeed, the United States Supreme Court has contemplated that a procedural rule could violate due process. *Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 707, 72 L. Ed. 2d at 504 (noting that a particular rule may offend due process, “but the mere use of procedural rules does not in itself violate the defendant’s due process rights”). As such, an order compliant with a rule that offends due process could itself offend due process.

Nor do we hold that a jurisdictional discovery order that violates the rules of civil procedure conclusively does burden a defendant’s due process rights. Certainly, if our Rule 30(b)(1) required Appellants to be deposed in Forsyth County, it would not be a violation of

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Appellants' due process rights to allow them to be deposed in the Philippines.<sup>2</sup> We simply hold that, in this case, the Order's requirement that Appellants appear for depositions during jurisdictional discovery does not burden Appellants' substantial right to due process and does not warrant immediate appeal.

Finally, with respect to Appellants' claim that the Order's travel requirement adversely, and irremediably, affects their substantial right to due process, we note that the Supreme Court has often stated that due process requires that a forum court's exercise of its jurisdiction must not "offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe*, 326 U.S. at 316, 90 L. Ed. at 102 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)). In this Court's view, there is nothing unfair or unjust about requiring Appellants, who voluntarily challenged North Carolina's jurisdiction in North Carolina, to travel at least to a location in the same hemisphere as the forum court to appear for its depositions. This is especially true in light of the fact that neither party seems able to agree on the appropriate scope of jurisdictional discovery. The depositions will almost certainly lead to discovery disputes that the parties will need to have resolved by the trial court, and conducting depositions three time zones away—rather than twelve—will enable such disputes to be resolved timely and efficiently and will facilitate and expedite the depositions, as well as the jurisdictional discovery process in general. We therefore conclude that Appellants' due process rights are not irremediably burdened by the requirement that they travel to California to appear for depositions, and we hold that no substantial right of Appellants is adversely affected so as to warrant immediate appeal.

In so holding, we note that Appellants' implicit agreement to abide by the "legal rules and presumptions" of the North Carolina court system necessarily includes the agreement to abide by the rules

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2. A plausible argument could be made that a violation of a procedural rule, which a defendant implicitly agreed to abide by when waiving his due process rights for the purpose of determining jurisdiction, would exceed the scope of the waiver and, thus, encroach on the defendant's due process rights. However, this argument would lead to the absurd result that any nonresident party who fully waives personal jurisdiction has the right to immediate appeal of every interlocutory order alleging a rule violation because those violations would burden his substantial right of due process. It must be some aspect of the jurisdictional discovery order, independent of, and more than, its violation of the rule that burdens a party's due process interest. As such, assuming the Order violated Rule 30(b)(1), that violation would not, in and of itself, burden Appellants' "substantial right to due process" and warrant immediate appeal.

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governing appeal of interlocutory orders. As this Court has often held, whether an interlocutory order may be appealed based on the order's effect on a substantial right is a determination to be made based on the facts of each case. *See Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 192-93, 540 S.E.2d 324, 327 (2000) (noting that, in applying the "substantial right" test, "[i]t is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered"). The factual and procedural context of this case, although rather unusual, does not present a deprivation of any substantial right of Appellants that cannot be redressed in a timely appeal from a final judgment. Accordingly, this appeal is

DISMISSED.

Judges STEELMAN and ROBERT N. HUNTER, JR. concur.

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STATE OF NORTH CAROLINA v. ROBERT RIGDON SCRUGGS, JR.

No. COA10-921

(Filed 1 March 2011)

**Search and Seizure— traffic stop—motion to suppress evidence—reasonable suspicion—probable cause**

The trial court did not err in a driving while impaired case by denying defendant's motion to suppress evidence obtained as a result of a stop and arrest. The stop by the officers was based on reasonable suspicion and the arrest was based on probable cause. Further, even if the stop and arrest violated N.C.G.S. § 15A-402 based on a university police officer making the stop outside of his statutory jurisdiction, it did not rise to the level of a substantial violation.

Appeal by defendant from judgment entered 21 April 2010 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 11 January 2011.

*Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for the State.*

*James H. Monroe for defendant-appellant.*

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BRYANT, Judge.

Where no error in a defendant's stop and arrest rises to the level of a substantial violation of Chapter 15A, the trial court does not err in denying the defendant's motion to suppress the evidence obtained as a result thereof.

*Facts*

Around 11 p.m. on 17 July 2009, Officers J.B. Smith and M.A. Graves of the University of North Carolina at Greensboro ("UNCG") Police Department, were assigned to assist with a traffic checkpoint being conducted by the North Carolina A & T State University ("A&T") Police Department on the A&T campus in Greensboro. The checkpoint was canceled due to rain, and Officers Smith and Graves instead began a roving patrol in Guilford County looking for traffic violations, with an emphasis on driving while impaired offenses. At the time, a mutual aid agreement existed between the UNCG Police Department and the City of Greensboro which extended the jurisdiction of the UNCG Police Department in certain situations.

While observing traffic on Elm Street in downtown Greensboro, the officers saw defendant Robert Rigdon Scruggs, Jr., driving towards them on a moped. Officer Smith noticed defendant come to a "jerky" stop at an intersection and appear to have trouble maintaining his balance. Once the stoplight changed, defendant passed the car ahead of him on the right and made a right turn onto McGee Street. Officer Smith also believed defendant's helmet was not in compliance with Department of Transportation regulations. Based on these observations, the officers activated their blue lights and pulled defendant over. Officer Smith testified that, at the time he stopped defendant, he had probable cause to believe he had made an illegal turn and was wearing an illegal helmet, but only reasonable suspicion that defendant was driving while impaired.

Defendant first told the officers he had not been drinking, but then admitted he had consumed half a glass of red wine with his dinner. During this exchange, Officer Smith noted a moderate odor of alcohol and defendant's thick speech. The officers administered three field sobriety tests and noted several possible signs of impairment. On this basis, the officers arrested defendant for driving while impaired and transported him to a mobile Intoxilyzer unit. Defendant refused to submit a breath sample, stating "if I take it, I'll be admitting that I am impaired."

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On 2 November 2009, defendant was indicted for driving while impaired and habitual driving while impaired. Defendant entered a plea of not guilty and the matter came on for trial during the 19 April 2010 session of Guilford County Superior Court. During the trial, defendant filed a motion to suppress evidence obtained and statements made following his arrest. Following a hearing outside the presence of the jury, the trial court announced findings of fact and conclusions of law in open court and denied defendant's motion. No written order was entered.

During the State's evidence, defendant stipulated to having three prior DWI convictions within ten years of the current charge. The jury returned a guilty verdict, and defendant was sentenced as a habitual impaired driver, receiving an active term of fifteen to eighteen months in prison. Defendant appeals.

*Standard of Review*

On appeal, defendant argues the trial court committed reversible error in denying his motion to suppress. We disagree.

Our standard of review from denial of a motion to suppress is well-established:

"This Court's review of a trial court's denial of a motion to suppress in a criminal proceeding is strictly limited to a determination of whether the court's findings are supported by competent evidence, even if the evidence is conflicting, and in turn, whether those findings support the court's conclusions of law." *In re Pittman*, 149 N.C. App. 756, 762, 561 S.E.2d 560, 565 (citation omitted), *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003). "[I]f so, the trial court's conclusions of law are binding on appeal." *State v. West*, 119 N.C. App. 562, 565, 459 S.E.2d 55, 57, *disc. review denied*, 341 N.C. 656, 462 S.E.2d 524 (1995). "If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982).

*State v. Veazey*, — N.C. App. —, —, 689 S.E.2d 530, 532 (2009), *disc. review denied*, 363 N.C. 811, — S.E.2d — (2010). "However, the trial court's conclusions of law are reviewed *de novo* and must be legally correct." *State v. Hernandez*, 170 N.C. App. 299, 304, 612 S.E.2d 420, 423 (2005) (citation omitted).

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*Analysis*

Unlawfully seized evidence is subject to suppression as provided in § 15A-974:

Upon timely motion, evidence must be suppressed if:

- (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or
- (2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:
  - a. The importance of the particular interest violated;
  - b. The extent of the deviation from lawful conduct;
  - c. The extent to which the violation was willful;
  - d. The extent to which exclusion will tend to deter future violations of this Chapter.

N.C. Gen. Stat. § 15A-974 (2009). Here, defendant concedes that his stop by the officers was based on reasonable suspicion and his arrest was based on probable cause; thus, both the traffic stop and arrest were constitutional. *See State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008); *State v. Mangum*, 30 N.C. App. 311, 314, 226 S.E.2d 852, 854 (1976). We are then left to determine whether defendant's stop and arrest were the result of a substantial violation of Chapter 15A of our General Statutes. Our review of the record indicates that the trial court considered each of the factors listed in § 15A-974, and that its findings that the stop was constitutional, that any violation of Chapter 15A was not willful and there was nothing to suggest that suppression of the evidence would deter future violations of Chapter 15A are fully supported by competent evidence. We next consider whether the trial court's conclusions were legally correct.

The UNCG Police Department is established, and its jurisdiction defined, by our General Statutes, which provide:

The Board of Trustees of any constituent institution of The University of North Carolina, or of any teaching hospital affiliated with but not part of any constituent institution of The University of North Carolina, or the Board of Directors of the North Carolina Arboretum, may establish a campus law enforcement agency and

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employ campus police officers. Such officers shall meet the requirements of Chapter 17C of the General Statutes, shall take the oath of office prescribed by Article VI, Section 7 of the Constitution, and shall have all the powers of law enforcement officers generally. The territorial jurisdiction of a campus police officer shall include all property owned or leased to the institution employing the campus police officer and that portion of any public road or highway passing through such property or immediately adjoining it, wherever located.

N.C. Gen. Stat. § 116-40.5(a) (2009). Further,

[a] campus police officer: (i) appointed by a campus law-enforcement agency established pursuant to G.S. 116-40.5(a); (ii) appointed by a campus law enforcement agency established under G.S. 115D-21.1(a); or (iii) commissioned by the Attorney General pursuant to Chapter 74E or Chapter 74G of the General Statutes and employed by a college or university which is licensed, or exempted from licensure, by G.S. 116-15 may arrest a person outside his territorial jurisdiction when the person arrested has committed a criminal offense within the territorial jurisdiction, for which the officer could have arrested the person within that territory, and the arrest is made during such person's immediate and continuous flight from that territory.

N.C. Gen. Stat. § 15A-402(f) (2009). However, despite these jurisdictional restrictions, campus police departments, such as UNCG's, "may enter into joint agreements with the governing board of any municipality to extend the law enforcement authority of campus police officers into any or all of the municipality's jurisdiction and to determine the circumstances in which this extension of authority may be granted." N.C.G.S. § 116-40.5(b).

Section 3.2 of the mutual aid agreement between the City of Greensboro and the UNCG Police Department extended the authority and jurisdiction of UNCG officers to make arrests off campus when they: 1) have probable cause to believe a felony has been committed; 2) have probable cause to believe that a misdemeanor has been committed and the person to be arrested might otherwise evade apprehension or cause harm to himself, other people or property unless immediately arrested; 3) witness a traffic offense or misdemeanor in a specific area near campus; and 4) see an individual for whom there is an outstanding warrant or order for arrest. Here, the first, third and fourth situations were not present. Rather, the State

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asserts the officers arrested defendant under the second provision because they had probable cause to believe defendant had committed a misdemeanor in their presence and could harm himself or others if not arrested. As noted above, defendant does not dispute the constitutionality of his arrest, but instead argues that the underlying stop was illegal and the resulting arrest was a substantial violation of § 15A-402. We are not persuaded by defendant's contention.

"The evidence obtained in [a] search and seizure need not be excluded even if the arrest out of which the search and seizure arose was unauthorized under G.S. 15A-402." *State v. Melvin*, 53 N.C. App. 421, 428, 281 S.E.2d 97, 102 (1981), *cert. denied*, 305 N.C. 762, 292 S.E.2d 578 (1982). In *State v. Harris*, we considered the effect of a law enforcement officer making a stop outside his statutory jurisdiction pursuant to N.C.G.S. § 15A-402(b). 43 N.C. App. 346, 349, 258 S.E.2d 802, 804, *appeal dismissed*, 298 N.C. 808, 261 S.E.2d 920 (1979). In that case, a sheriff's deputy made the stop outside the county where he had jurisdiction. *Id.* Recognizing that "[t]he statute [§ 15A-402] speaks in terms of 'arrest' and, without reaching the question of whether these events blossomed from an investigatory stop into an 'arrest' in terms of the statute, we note that the stop was constitutional . . ." *Id.* We then concluded that "[e]ven if an 'arrest' in terms of the statute, this is not a 'substantial' violation of Chapter 15A which would require exclusion of the evidence." *Id.*; see also *Mangum*, 30 N.C. App. at 314, 226 S.E.2d at 854 ("The technical violation of this statute [G.S. 15A-402] . . . does not necessarily require exclusion of evidence obtained in the search incident to the arrest.").

Although *Harris* dealt with subsection (b), rather than subsection (f), as here, nevertheless, we find it instructive. Both subsections deal with the jurisdiction of various law enforcement officers and specify who they "may arrest." Section 15A-402(f) deals with arrests, and here, defendant's arrest was both constitutional and specifically permitted under terms of the mutual aid agreement as authorized by § 116-40.5(a). Just as the out-of-jurisdiction arrest following a constitutional stop in *Harris* was not a substantial violation of Chapter 15 meriting suppression of evidence, we believe defendant's stop and arrest here, even if in violation of § 15A-402, does not rise to the level of a substantial violation. Therefore, the trial court did not err in denying defendant's motion to suppress the evidence obtained.

## IN RE N.T.S.

[209 N.C. App. 731 (2011)]

Affirmed.

Judges McGEE and BEASLEY concur.

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IN THE MATTER OF: N.T.S.

No. COA10-1154

(Filed 1 March 2011)

**Appeal and Error— interlocutory orders and appeals—temporary child custody order—no substantial right**

The guardian *ad litem*'s appeal from interlocutory orders was dismissed. Although the appeal arose from consolidated actions including a juvenile petition for neglect and dependency under Chapter 7B and a child custody action under Chapter 50, the 7 July 2010 order was best characterized as a temporary child custody order under Chapter 50. The four-month time period was reasonably brief, and thus, the order did not affect a substantial right.

Appeal by Respondent-mother from order entered 25 March 2009 by Thomas V. Aldridge, Jr., and order entered 7 July 2010 by Judge William F. Fairley in Columbus County District Court. Heard in the Court of Appeals 2 February 2011.

*Terri Martin for Petitioner Columbus County Department of Social Services.*

*Pamela Newell, GAL Appellate Counsel, North Carolina Administrative Office of the Courts, for guardian ad litem.*

*Richard Croutharmel for Respondent-mother.*

*No brief for Respondent-father.*

STEPHENS, Judge.

*I. Procedural and Factual Background*

N.T.S.<sup>1</sup> was born to Respondent-mother T.S. and her husband, Respondent-father L.S., on 3 January 2005. Respondent-parents sepa-

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1. Initials have been used throughout to protect the identity of the juvenile.

## IN RE N.T.S.

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rated on or about 10 May 2007, and N.T.S. resided with Respondent-mother.

*A. Chapter 50 Custody Action*

On 1 August 2007, Respondent-father filed a complaint pursuant to Chapter 50 of the North Carolina General Statutes in Columbus County District Court (07 CVD 1232) seeking custody, visitation and support.<sup>2</sup> On 7 May 2008, the district court awarded joint custody of N.T.S. to Respondent-parents. On 14 August 2008, the Columbus County Department of Social Services (“CCDSS”) moved to intervene, asserting that there existed an action between Respondent-father and CCDSS, that CCDSS was the current custodian of N.T.S., and that CCDSS was entitled to intervene as a matter of law to seek child support. The district court entered an order allowing the motion and requiring that Respondent-father pay child support to North Carolina Child Support Centralized Collections for appropriate disbursement.

*B. Chapter 7B Juvenile Action*

On 24 April 2008, CCDSS filed a juvenile petition pursuant to Chapter 7B of the North Carolina General Statutes (08 JA 41) alleging that N.T.S. was neglected and dependent.<sup>3</sup> Nonsecure custody of N.T.S. was awarded to CCDSS on the same date. On 16 June 2008, the juvenile court conducted adjudication and disposition hearings. Orders adjudicating N.T.S. as a neglected and dependent juvenile and ordering that she remain in the legal and physical custody of CCDSS were entered 7 October 2008.

On 14 October 2008, Respondent-mother filed a Rule 60 motion, seeking to have the adjudication and disposition orders set aside on the ground that they were entered some 112 days after the hearing, which she alleged was prejudicial to her. On the same date, the juvenile court vacated the adjudication and disposition orders because they had not been entered in a timely fashion after the hearing. On 22 October 2008, CCDSS filed a second juvenile petition under the same file number, adding an allegation that N.T.S. was an abused juvenile.

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2. Chapter 50, entitled “Divorce and Alimony,” governs, *inter alia*, disputes between parents regarding the custody of their minor children, as well as related matters of visitation and support. Specifically, it provides that parents “claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child[.]” N.C. Gen. Stat. § 50-13.1(a) (2009).

3. Chapter 7B is our State’s Juvenile Code, and Subchapter I governs actions related to abused, neglected and dependent juveniles.

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*C. Consolidation of Actions*

On 14 January 2009, Respondent-father moved to consolidate his custody, visitation and support action (07 CVD 1232) with the juvenile petition proceedings (08 JA 41); on 12 February 2009, the juvenile court granted the motion and consolidated the actions. *See* N.C. Gen. Stat. § 7B-200(d) (2009) (providing that “the court in a juvenile proceeding may order that any civil action or claim for custody filed in the district be consolidated with the juvenile proceeding”). On 25 March 2009, the juvenile court entered a consent order of adjudication in which it adjudicated N.T.S. a neglected and dependent juvenile. The juvenile court decreed that N.T.S. remain in the custody of CCDSS and ordered the parties back into court on 1 April 2009 for a disposition hearing.

After numerous disposition hearings between 7 July 2009 and 3 June 2010, on 7 July 2010, the juvenile court filed an order, entitled “Temporary Order,” awarding legal custody of N.T.S. to Respondent-father and supervised visitation to Respondent-mother. The juvenile court also ordered Respondent-parents to complete a program called “Strengthening Families.” The juvenile court found it necessary to enter a temporary order “to achieve certain counseling for the parties and the child and to assess the value of the ‘Strengthening Families’ program offered by CAPP [the Child Advocacy and Parenting Place].” The juvenile court further decreed that it would review the terms of the temporary order “at its first term of Juvenile [C]ourt for Columbus County at which abuse and neglect and dependency cases are heard occurring after the expiration of 120 days from the date that this Order is filed.”

On 16 July 2010, Respondent-mother, *pro se*, filed notice of appeal from the 25 March 2009 adjudication order in the juvenile case and from the 7 July 2010 “Temporary Order” changing legal custody from CCDSS to Respondent-father. In her brief, Respondent-mother makes two arguments: that the trial court (I) erred in failing to properly determine whether she had waived counsel with regard to the June 2010 dispositional hearing, and (II) abused its discretion and exceeded its authority under N.C. Gen. Stat. § 7B-904 by ordering that her visits with N.T.S. be supervised. As discussed below, we conclude that this appeal is from an interlocutory order and, accordingly, dismiss.

*II. Interlocutory Appeal*

The guardian *ad litem* has filed a motion to dismiss this appeal on the ground the adjudication and temporary orders are interlocutory,

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and thus not immediately appealable, because no final order of disposition has been entered. The right to appeal in a juvenile action is governed by N.C. Gen. Stat. § 7B-1001, which provides, in pertinent part:

(a) In a juvenile matter under this Subchapter, appeal of a final order of the court in a juvenile matter shall be made directly to the Court of Appeals. Only the following juvenile matters may be appealed:

(1) Any order finding absence of jurisdiction.

(2) Any order, including the involuntary dismissal of a petition, which in effect determines the action and prevents a judgment from which appeal might be taken.

(3) Any initial order of disposition and the adjudication order upon which it is based.

(4) *Any order, other than a nonsecure custody order, that changes legal custody of a juvenile.*

(5) An order entered under G.S. 7B-507(c) with rights to appeal properly preserved as provided in that subsection.

...

(6) Any order that terminates parental rights or denies a petition or motion to terminate parental rights.

N.C. Gen. Stat. § 7B-1001(a) (2009) (emphasis added). Thus, for an order in a juvenile case under Chapter 7B to be appealable, it must (1) be a final order, or (2) fall within one of the six matters listed above. See *In re A.T.*, 191 N.C. App. 372, 374, 662 S.E.2d 917, 918-19 (2008). Respondent-mother's notice of appeal lists both the 25 March 2009 consent adjudication order and the 7 July 2010 temporary order. The adjudication order does not fall within one of the matters from which an immediate appeal is permitted under the terms of section 7B-1001(a). However, the 7 July 2010 temporary order changed legal custody of N.T.S. from CCDSS to Respondent-father, making it immediately appealable under subsection (a)(4). See *In re J.V.*, 198 N.C. App. 108, 111, 679 S.E.2d 843, 844-45 (2009). Both of the issues Respondent-mother brings forward in her brief to this Court actually arise from the 7 July 2010 temporary order. Thus, Respondent-mother's appeal is not barred by section 7B-1001(a), and we must deny the guardian *ad litem*'s motion.

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Nonetheless, the 7 July 2010 order was both explicitly and in substance a temporary order, the terms of which were to be reviewed at the first term of juvenile court in Columbus County “at which abuse and neglect and dependency cases are heard occurring after the expiration of 120 days” following its filing. The temporary order was entered on 7 July 2010, and thus, by its own terms, a subsequent review was set for October 2010. Respondent-mother contends that, despite its label, the order is actually a disposition order pursuant to N.C. Gen. Stat. § 7B-808 and -905. Such an order would be immediately appealable under N.C. Gen. Stat. § 7B-1001(a)(3). However, our review indicates that the 7 July 2010 temporary order is a temporary custody order under Chapter 50, and thus, not immediately appealable.

As discussed above, this appeal arises from consolidated actions: a juvenile petition for neglect and dependency under Chapter 7B and a child custody action under Chapter 50. The 7 July 2010 order makes reference to the dual nature of the consolidated matter. For example, the order refers to consideration of the criteria set out in N.C. Gen. Stat. § 7B-906, which governs review of custody orders in abuse, neglect and dependency cases, and contains findings concerning the criteria “which the Court deems relevant.” However, the order goes on to conclude: “That there has been a substantial change in material circumstances affecting the welfare of the minor child and that such justifies a change in prior custody Orders of the District Court[.]” This language tracks that used in modifying custody orders between parents under Chapter 50. *Pulliam v. Smith*, 348 N.C. 616, 618-19, 501 S.E.2d 898, 899 (1998) (holding that a district court may order modification of an existing child custody order between two biological parents if the moving party shows a “‘substantial change of circumstances affecting the welfare of the child’ which warrants a change in custody”) (quoting *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974)); *see also* N.C. Gen. Stat. § 50-13.7(a) (2009) (stating that custody orders “may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party”). Thus, we conclude that the 7 July 2010 order is best characterized as a temporary child custody order under Chapter 50, rather than a disposition order under Chapter 7B.

As this Court has held:

Normally, a temporary child custody order is interlocutory and does not affect any substantial right . . . which cannot be protected by timely appeal from the trial court’s ultimate disposition . . . on

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the merits. Temporary custody orders resolve the issue of a party's right to custody pending the resolution of a claim for permanent custody.

*Brewer v. Brewer*, 139 N.C. App. 222, 227-28, 533 S.E.2d 541, 546 (2000) (internal citations and quotation marks omitted). An appeal from such an order is proper only if the trial court fails to "(1) state[] a clear and specific reconvening time in the order; and (2) the time interval between the two hearings [is not] reasonably brief." *Id.* at 228, 533 S.E.2d at 546 (citation omitted). Although we have not established a bright-line definition of "reasonably brief," we have held that intervals of approximately three and five months were reasonably brief and, thus, have dismissed appeals from temporary orders providing a rehearing within such time periods. *See File v. File*, 195 N.C. App. 562, 568, 673 S.E.2d 405, 410 (2009) ("We deem approximately five months to be a 'reasonably brief' time for a reconvening hearing."); *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807 (holding that, where a temporary custody order specifies a review within three months, "the order does not affect any substantial right of [an appellant] which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on the merits."), *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986). In contrast, we have held that "a year is too long a period to be considered as 'reasonably brief,' in a case where there are no unresolved issues." *Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546; *but see Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003) (holding a twenty-month period reasonably brief, where "the record shows evidence that during that period of time, the parties were negotiating a new arrangement").

The temporary order here was set for review after approximately four months, a time period more similar to that in *Dunlap* and *File*. We conclude that the four-month interval here was reasonably brief and that, as a result, the 7 July 2010 order was a temporary child custody order which is interlocutory and does not affect any substantial right. Accordingly, Respondent-mother's interlocutory appeal is dismissed.

Dismissed.

Judges STEELMAN and GEER concur.

## IN RE J.V.J.

[209 N.C. App. 737 (2011)]

## IN THE MATTER OF J.V.J.

No. COA10-1074

(Filed 1 March 2011)

**Juveniles—delinquency—assault on government officer—sufficiency of findings of fact**

The Court of Appeals granted a juvenile's petition for writ of *certiorari* and concluded that the trial court erred by failing to make sufficient findings of fact under N.C.G.S. § 7B-2411 to support the conclusion that the juvenile committed the offense of assault on a government officer. The case was remanded for additional findings.

On writ of *certiorari* to review order filed 20 January 2010 by Judge Beverly Scarlett in Orange County District Court. Heard in the Court of Appeals 27 January 2011.

*Attorney General Roy Cooper, by Assistant Attorney General Charles G. Whitehead, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for Respondent.*

STEPHENS, Judge.

*Factual and Procedural Background*

On 28 December 2009, a juvenile petition was filed against then 15-year-old J.V.J. ("Joseph"),<sup>1</sup> alleging that Joseph assaulted Officer Gary Beneville ("Officer Beneville"), a school resource officer at Chapel Hill High School, by "striking, kicking and scratching leaving cuts to [Officer Beneville's] left arm and hand as well as [his] forehead." An adjudication hearing on the petition was held at the 20 January 2010 Juvenile Session of Orange County District Court, the Honorable Beverly Scarlett presiding.

The evidence presented by the State at the hearing tended to show that on 23 November 2009, Officer Beneville was in the Chapel Hill High School cafeteria when he received a call from the school's office informing him that Joseph, a student at the school, was in one of the school's trailers and was "irate at the time and [the office] needed someone to come deal with him."

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1. "Joseph" is a pseudonym to protect the juvenile's privacy.

## IN RE J.V.J.

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When Officer Beneville arrived at the trailer, a teacher informed him that Joseph “was being belligerent” and “needed [] to leave.” When Officer Beneville asked Joseph to leave, Joseph “screamed at [Officer Beneville] several times that he wasn’t going anywhere.” Officer Beneville then picked up Joseph’s belongings, put his hand on Joseph’s shoulder, and attempted to “guide [Joseph] toward the door.” At that point, Joseph “dug his fingernails in [Officer Beneville’s] arm—kinda with both hands. And then yanked downward. Breaking off the fingernails [] in the skin.” Officer Beneville then “just pushed [his hand] back up against [Joseph] under his neck, pushed [Joseph] down on the desk and was trying to hold him down. [Joseph] was still kicking and punching and[] scratched [Officer Beneville’s] forehead with one of his fingernails and was screaming [that] he was going to claw [Officer Beneville’s] eyes out.”

Officer Beneville let Joseph up after “forty-five [] seconds, maybe a minute,” at which point Joseph “picked a chair up over his head [] as [if] he was going to throw it at [Officer Beneville].” Officer Beneville then drew his taser and told Joseph, “[I]f you throw that chair I’m going to tase you.” Following “a little bit of a stalemate[,]” Officer Beneville put away the taser, Joseph threw the chair on the floor, and Joseph was escorted to the principal’s office.

After the close of the State’s evidence, Joseph testified that he “became irritated [at a teacher] and—started yelling at her and—she [(the teacher)]—then told [him] to leave and—there were protocols that—were in place that, because of [his] Asperger’s diagnosis that—um, they’re suppose to prevent this from happening, but she did not follow those procedures.” Joseph testified that after Officer Beneville arrived and asked Joseph to leave, Officer Beneville grabbed Joseph’s arm and tried to “tug [him] out of [his] seat.” Joseph testified that he “felt that [he] was being attacked” so he “grabbed [Officer Beneville’s] arm and tried to pull [it] off[.]” Joseph further testified that the chair he lifted into the air was held only in front of him, and not above his head.

At the close of all the evidence, the trial court “enter[ed] a verdict of responsible” on the charge of assault on a government officer, and on 20 January 2010, the court filed its order adjudicating Joseph delinquent and continuing disposition until 17 February 2010. On 18 February 2010, the court continued disposition because Joseph was “currently in the hospital.” Disposition was again continued on 17 March 2010 because Joseph was “unavailable for court.” On 17 March

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2010, Joseph filed his notice of appeal from the 20 January 2010 adjudication of delinquency.<sup>2</sup>

*Petition for Writ of Certiorari*

In juvenile delinquency cases, appeal may only be taken from final orders, including an “order of disposition after an adjudication that a juvenile is delinquent[.]” N.C. Gen. Stat. § 7B-2602 (2009). However, “[a]n adjudication of delinquency is not a final order” and is therefore unappealable. *In re M.L.T.H.* —, N.C. App. —, —, 685 S.E.2d 117, 121 (2009) (quoting *In re Taylor*, 57 N.C. App. 213, 214, 290 S.E.2d 797, 797 (1982)); *see also* N.C. Gen. Stat. § 7B-2602. Acknowledging these circumstances, Joseph filed a 7 September 2010 petition for writ of *certiorari*, asking this Court to hear the merits of his appeal of the adjudication order.

A writ of *certiorari* may be issued by this Court to permit review of an order of the trial court “when no right of appeal from an interlocutory order exists[.]” N.C. R. App. P. 21(a)(1) (2009). In this case, because Joseph has no right to appeal the interlocutory adjudication order—in that Joseph is not appealing from any final orders pursuant to section 7B-2602—and because no appealable final order has yet been entered in the case, we grant *certiorari* to consider the arguments raised by Joseph regarding his adjudication of delinquency.

*Discussion*

As his sole argument on appeal, Joseph contends that the trial court erred by failing “to make sufficient findings of fact to support the conclusion that [Joseph] committed the offense of assault on a government officer.” For the following reasons, we agree.

With respect to the findings required of an adjudication order in the juvenile delinquency context, section 7B-2411 provides that

[i]f the court finds that the allegations in the petition have been proved [beyond a reasonable doubt], the court shall so state in a written order of adjudication, *which shall include, but not be limited to*, the date of the offense, the misdemeanor or felony classification of the offense, and the date of adjudication.

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2. On 19 May 2010, subsequent to Joseph’s appeal of the adjudication order, the trial court entered a temporary disposition order pursuant to section 7B-2605, which provides that “[p]ending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in every case unless the court orders otherwise. For compelling reasons . . . the court may enter a temporary order affecting the custody or placement of the juvenile . . .” N.C. Gen. Stat. § 7B-2605 (2009).

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N.C. Gen. Stat. § 7B-2411 (2009) (emphasis added).

In this case, the only adjudicatory findings made by the trial court are as follows:

Based on the evidence presented[,] [t]he following facts have been proven beyond a reasonable doubt:

The court finds that [Joseph] is responsible.

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We conclude that these findings are insufficient to satisfy the requirements of section 7B-2411.

We agree with the State that section 7B-2411 “does not require the [trial] court to delineate each element of an offense and state in writing the evidence which satisfies each element[,]” and we recognize that section 7B-2411 does not specifically require that an adjudication order “contain appropriate findings of fact[,]” as does section 7B-807, the statute governing orders of adjudication in the abuse, neglect, or dependency context. N.C. Gen. Stat. §§ 7B-807(b), 2411 (2009). Nevertheless, at a minimum, section 7B-2411 requires a court to state in a written order that “the allegations in the petition have been proved [beyond a reasonable doubt].” N.C. Gen. Stat. § 7B-2411. The “allegations in the petition” in this case are the following:

[Joseph] unlawfully and willfully did assault . . . and strike [Officer Beneville,] a government officer, by striking, kicking and scratching leaving cuts to [his] left arm and hand as well as [his] forehead.

At the time of the offense [Officer Beneville] was attempting to discharge the following duty of his[] office[:] [Joseph] had been instructed by [Officer Beneville] to leave the classroom. [Joseph] refused[.]. When [Officer Beneville] put [his] hand on [Joseph], [Joseph] began clawing at [Officer Beneville’s] left arm.

The adjudication order in this case fails to address any of these allegations as required by section 7B-2411. Indeed, the adjudication order does not even summarily aver that “the allegations in the petition have been proved[.]” The form on which the trial court made its findings contains a large blank area where the court is to state its findings. Rather than addressing the allegations in the petition in the blank area, the court used the space to (1) indicate, through a

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fragmentary collection of words and numbers, that an offense occurred and (2) state that Joseph was “responsible,” which, as the trial court noted at the close of the adjudication hearing, is a verdict and may more properly be characterized as a conclusion of law rather than a finding of fact. *Cf. In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (“As a general rule[] any determination requiring the exercise of judgment [] or the application of legal principles [] is more properly classified a conclusion of law.”). In our view, these “findings” insufficiently address the allegations in the petition. Accordingly, we conclude that the trial court erred by failing to include the requisite findings in its adjudication order. As such, we remand this case to the trial court to make the statutorily mandated findings in Joseph’s adjudication order.

REMANDED.

Judges GEER and McCULLOUGH concur.

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STONEY W. AMMONS, EMPLOYEE, PLAINTIFF v. GOODYEAR TIRE & RUBBER COMPANY, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA10-879

(Filed 1 March 2011)

**Workers’ Compensation— amendment to clarify benefit award—temporary total disability benefits—earning full salary wages**

The Industrial Commission did not err in a workers’ compensation case by amending the January 2009 award, nor did the full Commission err by affirming the July 2009 award. The amendment of the January award to clarify a deputy commissioner’s intentions regarding the benefit awarded was an appropriate exercise of the powers conferred upon the Industrial Commission by N.C.G.S. § 1A-1, Rule 60(b). Further, the Court of Appeals did not need to address whether plaintiff was entitled to late payment penalties because plaintiff was not entitled to temporary total disability benefits so long as he was earning full salary wages.

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Appeal by Plaintiff from opinion and award entered 10 March 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 December 2010.

*Hardison & Cochran, P.L.L.C., by J. Adam Bridwell, for Plaintiff.*

*Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones and Erika D. Jones, for Defendants.*

STEPHENES, Judge.

*Factual and Procedural Background*

In July 2005, while employed by Defendant Goodyear Tire & Rubber Company (“Goodyear”), Plaintiff Stoney W. Ammons (“Ammons”) sustained an injury “to his spine and left upper extremity.” Goodyear admitted the compensability of this injury, and “provided all medical treatment recommended by [Ammons’] treating physicians[.]” Subsequently, Ammons alleged that he suffered occupational injuries to his right shoulder and right hand in January 2006 and February 2008, respectively. Goodyear denied Ammons’ right to compensation for both of these claims.

Ammons requested hearings before the North Carolina Industrial Commission to contest Goodyear’s denial of his alleged occupational injuries. The hearings were consolidated, and in a 28 January 2009 opinion and award (the “January Award”), Deputy Commissioner Adrian A. Phillips (“Deputy Commissioner Phillips”) concluded that Ammons was not entitled to compensation for the January 2006 and February 2008 injuries to his right shoulder and arm. Deputy Commissioner Phillips further concluded, however, that Ammons’ position with Goodyear at the time of the hearing “require[d] physical activity in excess of the work restrictions opined by his treating physicians . . . and has been so modified that [Ammons] could not find similar work in the competitive marketplace.” Accordingly, Deputy Commissioner Phillips concluded that “[Ammons] is entitled to temporary total disability [ (“TTD”)] benefits from August 1, 2007[, the time when Ammons began working at his current position,] to the present and continuing until [Ammons] returns to suitable employment or is further ordered by the Industrial Commission.”

Neither party appealed the January Award, but in March 2009, Ammons filed a motion to show cause with the Industrial Commission, alleging that Goodyear had refused to pay the TTD ben-

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efits and requesting that the Industrial Commission enter an order requiring Goodyear to show cause as to why they should not be held in contempt for failing to comply with the January Award. Goodyear responded to Ammons' motion by arguing that Ammons was not entitled to benefits because he had been provided with his full salary and wages for each week he was requesting TTD benefits.

Following the 8 July 2009 show cause hearing, Deputy Commissioner Robert Wayne Rideout, Jr. ("Deputy Commissioner Rideout") issued an order finding that, at the show cause hearing, the parties were instructed that Goodyear would not be held in contempt and Goodyear was ordered to submit a motion for appropriate relief to Deputy Commissioner Phillips "to determine her position on [the January Award]." Deputy Commissioner Rideout's order further found that, in a 9 July 2009 telephone conference between the parties and Deputy Commissioner Phillips, Deputy Commissioner Phillips "indicated that it was not her intent to provide [Ammons] with TTD benefits in addition to his full salary and indicated that she would amend [the January Award] on her own Motion and clarify the [January Award] so that there was no confusion between the parties regarding benefits."

On 29 July 2009, Deputy Commissioner Phillips filed her amended opinion and award (the "July Award"), in which she noted that in the January Award,

[t]he Undersigned concluded in her Conclusions of Law that [Ammons] was entitled to [TTD] benefits from August 1, 2007 to the present and continuing until [Ammons] returns to suitable employment or is further ordered by the Industrial Commission. The Undersigned, however, did not explain in her Conclusions that since [Ammons] was gainfully employed in an unsuitable position, but earning full salary wages, that he was not entitled to further compensatory benefits as double recovery is not contemplated by the Act.

Deputy Commissioner Phillips concluded in the July Award that Ammons is "not entitled to further compensatory benefits if he is working in [his current] position and earning his full salary wages" and ordered that Goodyear is "not obligated to compensate [Ammons] for said [TTD] compensation if [Ammons] has earned full salary wages during this period of time."

Ammons appealed the July Award to the Full Commission, which, in a 10 March 2010 opinion and award, affirmed the July Award with

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only minor modifications not relevant to this appeal. On 1 April 2010, Ammons appealed the Full Commission's opinion and award to this Court.

*Discussion*

The Industrial Commission "has inherent power, analogous to that conferred on courts by [North Carolina Civil Procedure] Rule 60(b)(6), in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in achieving a just and proper determination of a claim requires it[.]" *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 129, 337 S.E.2d 477, 478 (1985); *see also Jenkins v. Piedmont Aviation Servs.*, 147 N.C. App. 419, 424-25, 557 S.E.2d 104, 108 (2001) ("N.C. Gen. Stat. § 1A-1 Rule 60(b) [] confers upon the [Industrial] Commission the ability to set aside a judgment where it finds . . . (6) Any [] reason justifying relief from the operation of the judgment."), *disc. review denied*, 356 N.C. 303, 570 S.E.2d 724 (2002). "Under the broad power of [Rule 60(b)(6)] an erroneous judgment cannot be attacked, but irregular judgments, those rendered contrary to the cause and practice of the court, come within its purview." *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 717, 220 S.E.2d 806, 811 (1975), *cert. denied*, 289 N.C. 619, 223 S.E.2d 396 (1976).

Conceding to the Industrial Commission this expansive power to set aside its own judgments, Ammons contends that in this case, the Industrial Commission's amendment of the January Award was not an appropriate exercise of this power, but rather, that it served merely as a substitute for Goodyear's failure to timely appeal the January Award and that, consequently, the Full Commission's affirmation of the July Award was error. We disagree. Based on our review of the record, the Industrial Commission's amendment to the January Award was not an attempt to provide Goodyear relief from an erroneous judgment, but was instead necessary supervision of its own judgments to do justice under the circumstances. *See Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 587-88 (1987) (noting that Rule 60(b)(6) "empowers the court to set aside or modify a final judgment, order or proceeding whenever such action is necessary to do justice under the circumstances").

As found in Deputy Commissioner Rideout's order, Deputy Commissioner Phillips did not intend to provide Ammons with TTD benefits in addition to full salary when she entered the January Award. Indeed, as noted by Deputy Commissioner Phillips in the July

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Award, “double recovery is not contemplated by [the Workers’ Compensation Act].” To “clarify” the January Award “so that there was no confusion between the parties regarding benefits[,]” Deputy Commissioner Phillips amended the January Award on her own motion.

Rather than attempting to provide relief from some erroneous finding or conclusion, as Ammons suggests, the amendment to the January Award properly sought to “clarify” Deputy Commissioner Phillips’ intentions regarding the benefits awarded. *Cf. Alston v. Fed. Express Corp.*, N.C. App. —, —, 684 S.E.2d 705, 707 (2009) (holding that in a situation where the parties could not agree on how to interpret the trial court’s order, “[p]ursuant to Rule 60(b)(6)’s ‘grand reservoir of equitable power,’ the trial court had jurisdiction to revisit its order so that its intentions could be made clear”). Because the amendment of the January Award was an appropriate exercise of the powers conferred upon the Industrial Commission by Rule 60(b), and not a “mere substitute” for an appeal, we find Ammons’ argument wholly meritless and conclude that the Industrial Commission did not err by amending the January Award and that the Full Commission did not err in affirming the July Award.

Further, because we conclude that the January Award was appropriately amended to reflect Deputy Commissioner Phillips’ intention that Ammons was not entitled to TTD benefits so long as he was earning full salary wages, we need not address Ammons’ argument that he is entitled to late payment penalties based on Goodyear’s failure to pay TTD benefits under the January Award. The Full Commission’s opinion and award is

AFFIRMED.

Judges STEELMAN and ROBERT N. HUNTER, JR. concur.

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[209 N.C. App. 746 (2011)]

STATE OF NORTH CAROLINA v. MARION PRESTON GILLESPIE

No. COA10-798

(Filed 1 March 2011)

**Sentencing— aggravated range—murder especially heinous, atrocious, or cruel—single aggravating factor outweighed multiple mitigating factors**

The trial court did not abuse its discretion in a murder case by sentencing defendant within the aggravated range based on its determination that the one stipulated aggravating factor, that the murder was especially heinous, atrocious, or cruel, outweighed multiple mitigating factors. Further, the trial court did not inappropriately consider the fact that the offense was reduced from first-degree murder to second-degree murder.

Appeal by defendant from judgment entered 3 December 2009 by Judge W. Erwin Spainhour in Rowan County Superior Court. Heard in the Court of Appeals 12 January 2011.

*Attorney General Roy Cooper, by Assistant Attorney General Peter A. Regulski, for the State.*

*Michael E. Casterline, for the defendant-appellant.*

STEELMAN, Judge.

Where the trial court determined that one aggravating factor outweighed multiple mitigating factors, the trial court acted within its discretion in sentencing the defendant from the aggravated range.

**I. Factual and Procedural History**

On 15 June 2003, Marion Gillespie (“defendant”) advised a Rowan County Deputy Sheriff that he had stabbed his girlfriend, Linda Faye Patterson Smith (“Smith”). When police arrived at the residence, they found Smith to be deceased and lying in the bathtub with multiple stab wounds. Defendant waived his *Miranda* rights and gave a statement contending that he and Smith had been arguing, and that she charged him with a knife. Defendant stated that in the subsequent struggle over the knife, he cut Smith’s arm, but could not recall anything further about the fight. Defendant attributed his loss of memory to medication that he was taking for cholesterol, blood pressure, diabetes and cancer. Smith was stabbed thirty-three times, including

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a cut five inches long and an inch-and-a-half deep that severed her carotid artery.

On 4 October 2004, the grand jury returned a superseding indictment charging defendant with first-degree murder and alleging the aggravating factor that the offense was especially heinous, atrocious, or cruel. N.C. Gen. Stat. § 15A-1340.16(d)(7) (2004). Defendant's first-degree murder conviction was reversed by the Supreme Court, and a new trial ordered. *State v. Gillespie*, 362 N.C. 150, 655 S.E.2d 355 (2008).

Upon remand to the trial court, defendant pled guilty to second-degree murder. Defendant stipulated to the existence of the aggravating factor that “[t]he offense was especially heinous, atrocious, or cruel,” and the State stipulated to the existence of the mitigating factor that “[t]he defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant’s culpability for the offense.” N.C. Gen. Stat. § 15A-1340.16(d)(7), (e)(3) (2009) On 3 December 2009, the trial court entered judgment. The trial court found the stipulated aggravating and mitigating factors as well as the following additional mitigating factors: (1) “defendant has accepted responsibility for the defendant’s criminal conduct” N.C. Gen. Stat. § 15A-1340.16(e)(15); (2) “defendant has a support system in the community” N.C. Gen. Stat. § 15A-1340.16(e)(18); (3) “defendant has a positive employment history” N.C. Gen. Stat. § 15A-1340.16(e)(19); (4) “defendant has a good treatment prognosis” N.C. Gen. Stat. § 15A-1340.16(e)(20); and the non-statutory mitigating factor that defendant had behaved well in prison. The trial court held that the aggravating factor outweighed all of the mitigating factors and imposed an active sentence from the aggravated range of 237 to 294 months.

Defendant appeals.

**II. Imposition of Aggravated Sentence**

In his only argument, defendant contends that the trial court erred in sentencing defendant by considering the State’s decision to reduce the charge from first-degree to second-degree murder, and by improperly analyzing a mitigating factor. We disagree.

**A. Standard of Review**

A trial court’s determination regarding the weight of aggravating and mitigating factors will not be overturned on appeal absent a showing of abuse of discretion. *State v. Rogers*, 157 N.C. App. 127,

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129, 577 S.E.2d 666, 668 (2003). “The balance struck by the sentencing judge in weighing the aggravating against the mitigating factors, being a matter within his discretion, will not be disturbed unless it is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.” *State v. Parker*, 315 N.C. 249, 258-59, 337 S.E.2d 497, 502-03 (1985) (quotations omitted).

**B. Analysis**

Defendant contends that he is entitled to a new sentencing hearing because the trial court erred by considering the fact that his offense was reduced from first-degree murder to second-degree murder. During the sentencing hearing, Judge Spainhour made the following comment:

I find the following mitigating factors: No. 3A, the defendant was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense. Therefore, I think that's why it's not murder in the first degree. It's murder in the second agree [sic], classically, I think.

Defendant contends that this statement shows that the trial court only considered his reduced culpability in considering a reduction in the charge, but did not give this factor appropriate weight when determining whether to impose a sentence from the aggravated or mitigated range.

Defendant attempts to read far too much into this comment made during the sentencing hearing. The trial court took note of the mental health issue raised by the defendant and the fact that it was a factor in his plea to a lesser charge being appropriate. In accordance with the express stipulation of the State and defendant, the trial court found this statutory mitigating factor. N.C. Gen. Stat. § 15A-1340.16 (e)(3). The trial court also found five additional mitigating factors as to which there was no stipulation by the State.

Once the trial court found aggravating and mitigating factors, it was required to weigh them pursuant to N.C. Gen. Stat. 15A-1340.16(b). In weighing aggravating and mitigating factors, the trial court exercises its discretion. *State v. Davis*, 58 N.C. App. 330, 333, 293 S.E.2d 658, 661 (1982), *disc. review denied*, 306 N.C. 745, 295 S.E.2d 482 (1982). It is for the trial court to determine the weight to be given to any particular aggravating or mitigating factor. The trial court does not simply add up the number of aggravating or mitigating

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factors, but rather is to carefully weigh the quality and importance of each factor. “A sentencing judge properly may determine in appropriate cases that one factor in aggravation outweighs more than one factor in mitigation and vice versa.” *Parker*, 315 N.C. at 258, 337 S.E.2d at 502 (1985).

Given the violent and vicious nature of the assault on Smith by defendant, we hold that the trial court did not abuse its discretion in giving more weight to the single stipulated aggravating factor (heinous, atrocious or cruel) than to the six statutory and non-statutory mitigating factors.

The sentence imposed by the trial court is affirmed.

AFFIRMED.

Judges ELMORE and ERVIN concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 FEBRUARY 2011)

BLANTON v. MELVIN No. 10-537	New Hanover (08CVS4321)	Dismissed
BOYLES v. N.C. REAL ESTATE COMM'N No. 10-367	Henderson (09CVS1502)	Affirmed
BURNS v. BURNS No. 10-50	Anson (07CVD49)	Affirmed in part, vacated and remanded in part.
CANTRELL v. DIEBOLD, INC. No. 09-1245	Indus. Comm. (755904)	Affirmed
ENGELHARD v. ENGELHARD No. 10-944	Wake (08CVD4587)	Affirmed
HAAS v. JUGIS No. 10-114	Clay (08CVS173)	Reversed
HAIRSTON v. HAIRSTON No. 10-990	Forsyth (05CVD6316)	Affirmed
HART v. PEREZ No. 09-1157	Brunswick (08CVS3068)	Affirmed
IN RE J.L.C. No. 10-1051	Chatham (08JT78)	Affirmed
JOHNSON-WHITE v. WHITE No. 10-569	New Hanover (08CVD438)	Affirmed
KING v. ORR No. 10-23	Pender (07CVS617)	Affirmed in part and reversed and remanded in part
SCHELLER v. OTTERBERG No. 10-257	Catawba (08CVS4849)	Affirmed
STATE v. ALEXANDER No. 10-836	Alamance (09CRS55739-40)	No Error

## IN THE COURT OF APPEALS

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STATE v. BORTONE No. 09-1286	Brunswick (08CRS52270) (08CRS52176)	No Error
STATE v. DANIELS No. 10-408	Wake (07CRS48052)	No Error
STATE v. DAVIS No. 10-822	Mecklenburg (09CRS233031) (09CRS63692)	Affirmed
STATE v. FISHER No. 10-579	McDowell (08CRS51722) (08CRS52506) (08CRS52497) (08CRS52510) (08CRS773) (08CRS52502)	Affirmed
STATE v. HAIRSTON No. 10-655	Person (06CRS52047)	Affirmed
STATE v. HERNANDEZ No. 10-776	Johnston (08CRS53123)	No Error
STATE v. JACOBS No. 10-797	Mecklenburg (08CRS50004) (08CRS50006)	Vacated and Remanded
STATE v. MARKS No. 10-628	Wake (09CRS40312) (08CRS76889-90)	Affirmed in part; vacated in part; and remanded for resentencing.
STATE v. MCLAUGHLIN No. 10-344	Moore (09CRS1639) (08CRS55611)	No Error
STATE v. MEDLIN No. 10-629	Wake (07CRS88049) (07CRS79100)	No Error
STATE v. MORGAN No. 10-727	Gaston (07CRS64489)	No Error

STATE v. PICKETT No. 10-702	Mecklenburg (07CRS22138-39)	No error in part, dismissed in part
STATE v. POSTON No. 10-730	Cleveland (08CRS51034-35)	No Error
STATE v. PURCELL No. 10-373	Cumberland (07CRS57530)	No Error
STATE v. SIMPSON No. 10-915	Guilford (08CRS110848) (09CRS77977-978)	Affirmed
STATE v. SMITH No. 10-708	Nash (09CRS53432)	Affirmed
STATE v. SMITH No. 10-889	Pender (08CRS50813) (08CRS51193)	Affirmed
STATE v. VAUGHN No. 10-110	Wayne (08CRS54091)	No Error
STATE v. WARD No. 10-808	Gaston (09CRS54606-07)	No Error
STATE v. WILLIAMS No. 10-2	Mecklenburg (07CRS243120)	Remanded for resentencing.
STRICKLAND v. COLLIAS No. 10-958	Mecklenburg (09CVS30045)	Dismissed
SULLIVAN v. CNTY. OF PENDER No. 10-368	Pender (06CVS282)	Dismissed
WACHOVIA MORTG., FSB v. DAVIS No. 10-572	Wake (08CVS3304)	Affirmed
WALLY v. CITY OF KANNAPOLIS No. 09-1080	Cabarrus (08CVS504)	Affirmed

CASES REPORTED WITHOUT PUBLISHED OPINIONS  
(FILED 1 MARCH 2011)

GRIFFITH v. N.C. DEP'T OF CORR. No. 10-1043	Anson (10CVS150)	Affirmed
HARRISON v. AEGIS CORP. No. 10-875	Bladen (08CVD885)	Dismissed in part and vacated in part
HODGES v. YOUNG No. 10-975	Moore (09CVD1481)	Affirmed in part and Reversed in Part
HUNT v. R.K. LOCK & ASSOCS. No. 10-891	Bladen (08CVD883)	Dismissed in part and vacated in part
HUTSON v. THALACKER No. 10-1177	Union (09CVS938)	Affirmed
IN RE C.J.M. No. 10-1183	Sampson (07JB40)	Reversed and Remanded
IN RE I.C. No. 10-1057	Mecklenburg (08JT481)	Affirmed
IN RE J.P. No. 10-1039	Watauga (06J41)	Affirmed in Part and Remanded for Further Proceedings in Part
IN RE J.S. No. 10-1054	Stokes (08JT23-24)	Affirmed
IN RE N.R.B. No. 10-908	Gaston (08JT150-152)	Affirmed
LEWIS v. NEW HANOVER CNTY. SCH. No. 10-721	Indust. Comm. (811680)	Affirmed
LUCAS v. R.K. LOCK & ASSOCS. No. 10-874	Bladen (08CVD884)	Dismissed in part and vacated in part

OAK HEALTH CARE INVESTORS OF N.C., INC. v. JOHNSON No. 10-535	Wake (08CVS3715) (09CVS6918) (05CVS3411)	Dismissed in part; Affirmed in part
PHILLIPS & JORDAN INV. v. GREUN MADAINN, INC. No. 10-507	Graham (06CVS26)	Affirmed
RIVER RUN LTD. P'SHIP v. EQUUS MERDA, INC. No. 10-469	Mecklenburg (08CVS1438)	Affirmed
RUSS v. RUSS No. 10-1141	Cumberland (09CVS9852)	Appeal dismissed
STATE v. BAILEY No. 10-827	Durham (09CRS40095) (09CRS4310)	No Error
STATE v. BARDNEY No. 10-973	Henderson (08CRS53306) (09CRS1321)	No prejudicial error
STATE v. BRIGHT No. 10-544	Wake (09CRS7878-81) (09CRS7883) (09CRS7871-72) (09CRS7889-94)	No Error
STATE v. BRYANT No. 10-909	Guilford (09CRS88433)	No Error
STATE v. BYERS No. 10-904	Forsyth (07CRS59506)	No Error
STATE v. CADY No. 10-872	Wake (08CRS43750) (08CRS58011-14)	Dismissed in part; No error in part
STATE v. DAVIS No. 10-898	Cleveland (08CRS4379) (08CRS55445)	No error in part; remanded.

## IN THE COURT OF APPEALS

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STATE v. DOBBS No. 09-1478	Onslow (08CRS54627-30)	No Error
STATE v. DOWSING No. 10-355	Onslow (08CRS55423) (08CRS51890)	No error in part, vacated in part, and remanded.
STATE v. FORD No. 10-318	Mecklenburg (07CRS62003) (07CRS232534-41) (07CRS229866)	Affirmed
STATE v. FORD No. 10-799	Mecklenburg (09CRS201759-60) (09CRS25799)	No Error
STATE v. GRAHAM No. 10-841	Forsyth (07CRS60435) (08CRS8912)	No Error
STATE v. GRIFFIN No. 10-796	Buncombe (08CRS54104) (09CRS126)	No Error
STATE v. HARRIS No. 10-555	Pitt (07CRS55832)	Affirmed
STATE v. HOLMES No. 10-830	Wake (08CRS23115) (08CRS68810)	No Error
STATE v. JORDAN No. 10-675	Wake (06CRS64112-15)	No Error
STATE v. KERLEY No. 10-643	Mecklenburg (08CRS13223)	Vacated
STATE v. LASANE No. 10-809	Mecklenburg (09CRS17717-18)	Affirmed
STATE v. LEYSHON No. 10-556	Watauga (08CRS51720)	No Error
STATE v. LOWERY No. 10-986	Union (08CRS53459-60)	No Error

## IN THE COURT OF APPEALS

STATE v. MASSEY No. 10-855	Cabarrus (07CRS52862) (09CRS9767)	Affirmed
STATE v. OWENS No. 10-1026	Davidson (09CRS52382)	No Error
STATE v. PIERCE No. 10-691	Onslow (08CRS55854) (09CRS1338-39)	No Error
STATE v. ROUT No. 10-768	Buncombe (09CRS59273-74) (09CRS685)	Affirmed
STATE v. SLOAN No. 10-756	Mecklenburg (09CRS204182-83) (09CRS204186-87) (09CRS24362)	Remanded for resentencing in part; no error in part
STATE v. STANLEY No. 10-554	Lenoir (09CRS50436)	Appeal dismissed, petition for certiorari denied
STATE v. STREATER No. 10-740	Davidson (06CRS3229)	No error in part; Vacated in part
STATE v. SULLIVAN No. 10-925	Pender (09CRS568-570)	No Error
STATE v. UZZELLE No. 10-600	Durham (05CRS47403-04)	No Error
STATE v. WATTERSON No. 10-1007	Gaston (09CRS2178) (09CRS51051-52)	No Error
STATE v. WEATHERS No. 10-890	Gaston (07CRS68318) (07CRS69942-45)	Affirmed

## IN THE COURT OF APPEALS

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STATE v. WILLIAMS No. 10-465	Gaston (06CRS68475) (08CRS9927) (06CRS68478) (06CRS68483) (06CRS68683)	No error in part, dismissed in part
SUTTON v. BENDER No. 10-1024	Wake (09CVD2474)	Affirmed
WARD v. DEAL CARE INN, INC. No. 10-942	Rowan (09CVS1078)	Dismissed
WEAVER'S ASPHALT & MAINT. CO. v. WILLIAMS No. 10-585	Nash (09CVS206)	Affirmed in part; Remanded in part
WHITE v. NORTHWEST PROP. GRP-HENDERSONVILLE No. 10-992	Henderson (09CVS938)	Appeal dismissed



## **HEADNOTE INDEX**



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**ACCOMPLICES AND ACCESSORIES**

**Accessory after the fact—armed robbery—motion to dismiss—sufficiency of evidence**—The trial court did not err by denying defendant's motion to dismiss the charge of accessory after the fact to armed robbery even though defendant contended there was insufficient evidence to show that an unlawful taking or attempt to take had occurred. Contrary to defendant's assertion, the robbery was complete once the stolen property was removed from the victim's possession instead of when defendant arrived at a place of safety. **State v. Cole, 84.**

**Accessory after the fact—second-degree murder—motion to dismiss—sufficiency of evidence**—The trial court did not err by denying defendant's motion to dismiss the charge of accessory after the fact to second-degree murder even though defendant contended there was insufficient evidence to show that he knew his nephew killed the victim. The totality of evidence gave rise to a reasonable inference for the jury to infer that defendant knew the close range shot was fatal. **State v. Cole, 84.**

**ADMINISTRATIVE LAW**

**De novo review—properly applied**—The superior court properly found that a waiver provision which determined petitioner's Medicaid eligibility did not carry the force of law as it was not promulgated in accordance with either the North Carolina Administrative Procedures Act or the federal Administrative Procedures Act. The superior court did not err in concluding that the Department of Health and Human Services' denial of benefits to petitioner was arbitrary and capricious and in reversing the order. **McCrann v. N.C. Dep't of Health & Human Servs., 241.**

**Department of Transportation—billboard permit revocation—insufficient connection between cutting vegetation and billboard**—The superior court erred in granting summary judgment in favor of the Department of Transportation (DOT) in an action concerning the revocation of petitioner's billboard permit. The DOT's final agency decision failed to show a sufficient connection between the cutting of vegetation by agents or employees of petitioner's son and the erection or maintenance of the billboard. **Powell v. N.C. Dep't of Transp., 284.**

**Department of Transportation—billboard permit revocation—insufficient connection between persons who cut vegetation and petitioner**—The superior court erred in granting summary judgment in favor of the Department of Transportation (DOT) in an action concerning the revocation of petitioner's billboard permit. The DOT failed to show a sufficient connection between those persons who cut the vegetation and petitioner. **Powell v. N.C. Dep't of Transp., 284.**

**Department of Transportation—delegation of authority—lawful**—Petitioner's argument that the General Assembly's delegation of authority to the Department of Transportation to promulgate rules regarding punishment was unlawful because adequate standards were not provided was overruled. The argument had already been rejected by the Supreme Court in 343 N.C. 303. **Powell v. N.C. Dep't of Transp., 284.**

**Erroneous denial of Medicaid benefits—reimbursement for services proper**—The superior court erred in denying petitioners' request for reimbursement for rehabilitation services paid by petitioners after respondent denied coverage for petitioner son's benefits. The vendor payment principle did not preclude the Department of Health and Human Services from making corrective

**ADMINISTRATIVE LAW—Continued**

action payments directly to petitioners and the expenses eligible for reimbursement were not limited to expenses petitioners incurred prior to acquiring Medicaid eligibility. The matter was remanded for an evidentiary hearing to determine the proper amount of reimbursement. **McCann v. N.C. Dep’t of Health & Human Servs.**, 241.

**Final agency decision—*de novo* review applied—adoption of administrative law judge’s decision permissible**—The superior court applied the appropriate *de novo* standard of review to the Department of Health and Human Services’ decision denying petitioner benefits. While the Administrative Procedures Act required the trial court to make findings of fact and conclusions of law, it explicitly permitted the trial judge to adopt the administrative law judge’s decision while fulfilling this duty. **McCann v. N.C. Dep’t of Health & Human Servs.**, 241.

**APPEAL AND ERROR**

**Appealability—mootness—eminent domain**—The property owners’ appeal in an eminent domain case was not moot even though construction of the pertinent pipeline on their property was complete. If the Court of Appeals found in their favor, property owners would be entitled to relief both in the form of reimbursement for their costs in the action, as well as in the form of return of title to the land. **Town of Midland v. Morris**, 208.

**Claims not before trial court—appellate issues not addressed**—The trial court declined to address plaintiffs’ remaining arguments in a wills case where the claims were neither alleged in plaintiffs’ complaint nor considered nor determined by the trial court. **Stanford v. Paris**, 173.

**Interlocutory orders and appeals—a substantial right affected—immediately appealable**—Plaintiff’s appeal from the trial court’s interlocutory order denying plaintiff’s motion to have the proceedings in a domestic action closed affected a substantial right and was immediately appealable. **France v. France**, 406.

**Interlocutory orders and appeals—contempt for failure to respond to subpoena—substantial right**—An order holding a non-party in contempt for noncompliance with a discovery order (failure to appear for a deposition after being subpoenaed) affected a substantial right and was immediately appealable. **First Mount Vernon Indus. Loan Ass’n v. Prodev XXII, LLC**, 126.

**Interlocutory orders and appeals—denial of motion to dismiss—personal jurisdiction**—Although defendant Swiss Bank appealed from an interlocutory order denying its motion to dismiss for lack of personal jurisdiction, defendant was entitled to immediate appellate review under N.C.G.S. § 1-277(b). **Speedway Motorsports Int’l, Ltd. v. Bronwen Energy Trading, Ltd.**, 474.

**Interlocutory orders and appeals—final judgment—alimony and equitable distribution order—attorney fees remaining—not substantive**—An alimony and equitable distribution judgment was final and appeal was not from an interlocutory order even though attorney fees had not been determined. A claim for attorney fees under N.C.G.S. § 50-16.4 is not a substantive issue or in any way part of the merits of the claim. **Lucas v. Lucas**, 492.

**APPEAL AND ERROR—Continued**

**Interlocutory orders and appeals—partial Industrial Commission decision**—An appeal from the Industrial Commission was dismissed where the opinion and award reserved the issues of the extent of the temporary disability and permanent partial disability. No substantial right would have been lost without immediate review. **Thomas v. Contract Core Drilling & Sawing**, 198.

**Interlocutory orders and appeals—partial summary judgments—common defenses—substantial right**—Appeals from summary judgments for some but not all of the parties were from interlocutory orders, but were not dismissed because there were common factual defenses, raising the possibility of inconsistent verdicts. Determination of the underlying substantive appeal promoted finality rather than fragmentation. **Kennedy v. Polumbo**, 394.

**Interlocutory orders and appeals—Rule 54(b) certification—no just reason for delay—avoiding piece-meal litigation**—Even though the Court of Appeals was not bound by the business court's N.C.G.S. § 1A-1, Rule 54(b) certification, in its discretion it reviewed the parties' appeals from interlocutory orders because there was no just reason for delay and to avoid piece-meal litigation given the multiple interrelated claims and counterclaims brought forth by the parties. **Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer**, 369.

**Interlocutory orders and appeals—temporary child custody order—no substantial right**—The guardian *ad litem*'s appeal from interlocutory orders was dismissed. Although the appeal arose from consolidated actions including a juvenile petition for neglect and dependency under Chapter 7B and a child custody action under Chapter 50, the 7 July 2010 order was best characterized as a temporary child custody order under Chapter 50. The four-month time period was reasonably brief, and thus, the order did not affect a substantial right. **In re N.T.S.**, 731.

**Interlocutory orders and appeals—voluntary submission to North Carolina jurisdiction—motion to compel depositions—bound to participate in jurisdictional discovery**—Defendants' appeal from an interlocutory discovery order granting plaintiffs' motion to compel depositions was dismissed. Defendants had voluntarily submitted to North Carolina jurisdiction to decide the issue of personal jurisdiction in the action, and thus, were bound to participate in jurisdictional discovery the trial court ordered. In this case, the order's requirement that defendants appear in California for depositions during jurisdictional discovery did not burden defendants' substantial right to due process and did not warrant immediate appeal. **K2 Asia Ventures v. Trota**, 716.

**Mootness—involuntary commitment order**—The validity of an involuntary commitment order was not moot on appeal even though the commitment term had passed because the order could result in collateral legal consequences. **In re Watson**, 507.

**Motion for appropriate relief—erroneous denial of motion to suppress evidence**—The trial court erred in a drugs case by denying defendant's motion for appropriate relief based on the denial of his request to suppress any evidence obtained by police as a result of a traffic stop. The warrantless search of defendant's vehicle incident to his arrest violated his Fourth Amendment rights because he was not within reaching distance of his vehicle, and there was no reasonable

**APPEAL AND ERROR—Continued**

basis for searching the vehicle for evidence of the offense for which defendant was arrested. **State v. Mbacke, 35.**

**Preservation of issues—constitutional argument—not raised at trial—no merit**—Defendant waived appellate review of his argument that he received multiple punishments for the same act in violation of the Double Jeopardy Clauses of the United States and North Carolina Constitutions where defendant raised no objection based upon double jeopardy at trial. Even assuming *arguendo* that the issue was properly preserved, second-degree murder and sale or delivery of a controlled substance to a juvenile are not identical offenses for purposes of double jeopardy. **State v. Parlee, 144.**

**Preservation of issues—constitutional errors—not raised at trial**—Defendant's argument that she was denied substantive due process by the use of a taser, shackles, handcuffs and subterfuge to compel her presence in court was not properly before the Court of Appeals and was dismissed. Because defendant did not raise these constitutional issues at trial, she failed to preserve them for appellate review. **State v. Whitted, 522.**

**Preservation of issues—default judgment—failure to attack trial court judgment**—The North Carolina State Bar Disciplinary Hearing Commission did not violate defendant attorney's due process rights and the North Carolina Administrative Code by reinstating defendant's disbarment without conducting a hearing. Defendant never moved to vacate the 20 September 2006 entry of default against him and never appealed the 27 October 2006 order of discipline based thereon. Further, all of the facts supporting the reinstatement of defendant's disbarment had been affirmatively established in the prior proceedings. **N.C. State Bar v. Wood, 454.**

**Preservation of issues—failure to argue**—Assignments of error numbered one through four that defendant failed to address in his brief were deemed abandoned under N.C. R. App. P. 28(b)(6). **State v. Oakes, 18.**

**Preservation of issues—failure to give notice of appeal**—Although defendant contended that the trial court erred in a drugs case by denying his motion to suppress and denying his motions *in limine* at trial, defendant gave no written or oral notice of appeal from the judgment entered at the conclusion of the trial or from the order denying the motion to suppress. Thus, the only issue properly before the Court of Appeals was the trial court's denial of defendant's motion for appropriate relief. **State v. Mbacke, 35.**

**Preservation of issues—failure to object—plain error not argued**—The Court of Appeals dismissed defendant's assertion that the trial court committed plain error in a case involving multiple charges by admitting out-of-court statements by her niece as substantive evidence. Defendant did not object to this evidence at trial and failed to argue plain error in her brief to the Court. **State v. Whitted, 522.**

**Preservation of issues—failure to object—waiver of assignment of error**—Defendant waived his assignment of error related to the admission of defendant's recorded video statement in a robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon case. Defendant failed to register an appropriate objection at trial to the introduction of the evidence. **State v. Boyd, 418.**

**APPEAL AND ERROR—Continued**

**Preservation of issues—failure to raise constitutional issue at trial—** Although defendant contended that the trial court violated his constitutional guarantee against double jeopardy by convicting him of accessory after the fact to second-degree murder and armed robbery where the two convictions were based on the same underlying facts, he failed to preserve this issue because he did not raise it at trial. **State v. Cole, 84.**

**Preservation of issues—failure to raise constitutional issue at trial—** Petitioner's argument that the Department of Transportation's revocation of his billboard permit violated his due process rights was dismissed where petitioner failed to raise the constitutional issue at trial. **Powell v. N.C. Dep't of Transp., 284.**

**Preservation of issues—failure to raise in business court—lack of verification of complaint not jurisdictional—** Plaintiffs' motion to strike footnote two in defendant cross-appellees' brief was granted under N.C. R. App. P. 10. Lack of verification under N.C.G.S. § 1A-1, Rule 23(b) was not jurisdictional, and defendants' arguments concerning lack of verification of the complaint were waived because they were not raised before the business court. **Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer, 369.**

**Preservation of issues—failure to request special instruction—** Although defendant contended that the trial court abused its discretion by failing to instruct the jury at the time of the playing of a recording to rely solely on the court appointed written translation, this argument was dismissed because defendant failed to request any special instructions regarding the recording. **State v. Gomez, 611.**

**Preservation of issues—juvenile adjudications—sufficiency of evidence—** Respondent juvenile failed to preserve for appellate review his argument that the State presented insufficient evidence to sustain adjudications that the juvenile was delinquent for having committed second degree sexual assault and indecent liberties between children. However, the Court of Appeals chose to exercise its authority under N.C. R. App. P. 2 to review respondent juvenile's arguments. **In re A.W., 596.**

**Preservation of issues—managing conduct of trial—** It was the trial court's responsibility in a first-degree murder case to initially pass on any concerns it had with the trial, especially since it was in a better position to observe and control the trial proceedings. The trial court should not abdicate its role in managing the conduct of trial to an appellate court. **State v. Oakes, 18.**

**Preservation of issues—no legal argument—assignment of error abandoned—** Plaintiffs' argument that the trial court erred by omitting testator's checking account from the list of assets it determined should pass under the laws of intestacy was deemed abandoned where plaintiffs provided no legal argument in their brief in support of the assignment of error. **Stanford v. Paris, 173.**

**Preservation of issues—orders not appealed from—argument dismissed—no abuse of discretion—** Plaintiffs' argument that the trial court erred in an action arising from a construction dispute by granting defendants' motion for discovery sanctions and entering default judgment against plaintiff Honeycutt Contractors ("Honeycutt") on defendants' counterclaim was dismissed where

**APPEAL AND ERROR—Continued**

neither of the orders were properly appealed from. Even assuming *arguendo* that the argument had been properly brought before the Court of Appeals, the trial court did not abuse its discretion as the trial court considered lesser sanctions and the sanctions imposed were appropriate in light of Honeycutt's actions in the case. **Honeycutt Contractors, Inc. v. Otto, 180.**

**Preservation of issues—response to jury question—no request that jury be returned to courtroom**—Defendant waived his right to appeal the issue of whether the trial judge erred by answering a jury question from the jury room doorway where defense counsel did not request that the jury be brought into the courtroom when the court asked counsel about its proposed procedure. **State v. Starr, 106.**

**Preservation of issues—restitution—preserved without objection**—An award of restitution is deemed preserved for appellate review even without a specific objection. **State v. Moore, 551.**

**Preservation of issues—sanctions—order not appealed—default judgment—based upon sanctions order**—Plaintiff Honeycutt Contractors (“Honeycutt”) argument that the trial court erred in an action arising from a construction dispute by denying its motion to set aside a discovery sanctions order was dismissed where Honeycutt did not give notice of appeal from the order. Honeycutt’s argument that the trial court erred by entering default judgment in favor of defendants was without merit as the argument was predicated upon Honeycutt’s contentions pertaining to the discovery sanctions order. **Honeycutt Contractors, Inc. v. Otto, 180.**

**Sentencing within presumptive range—no appeal as of right**—A defendant convicted of felony death by vehicle was not entitled to appeal as a matter of right whether his sentence was supported by evidence introduced at trial where the sentence was within the presumptive range. Defendant did not petition for a writ of *certiorari*. **State v. Ziglar, 461.**

**Rules violations—transcript—not jurisdictional or substantial**—The Rules of Appellate Procedure which deal with the time and manner for ordering, preparation, and delivery of the transcript (Rules 7(a)(1) and 7(b)(2)) are not jurisdictional and violations that were not substantial or gross did not result in sanctions. **Kennedy v. Polumbo, 394.**

**ASSAULT**

**On firefighter with firearm—evidence sufficient**—The trial court properly denied defendant’s motion to dismiss three charges of assaulting a firefighter with a firearm where defendant argued that there was insufficient evidence that the firefighters knew of or otherwise were in fear of defendant’s blind shots into a door which they were forcing. Sustaining a conviction for assault did not require that a victim be placed in fear, only that an overt act was performed that was sufficient to put a person of reasonable firmness in fear of immediate bodily harm. Here, the evidence tended to show that defendant shot twice at a door which firefighters were attempting to force open and once in the direction of the firefighters after they entered. **State v. Starr, 106.**

**On firefighter with firearm—instructions—oral request for special instruction—denied**—The trial court did not err by giving only the pattern jury

**ASSAULT—Continued**

instruction on assault where defendant did not submit his request for a special instruction on the definition of assault in writing. **State v. Starr, 106.**

**ATTORNEY FEES**

**Amount—findings not sufficient**—The trial court abused its discretion in the amount of attorney fees it awarded to plaintiff in an employment termination case where the court did not enumerate any findings as to counsel's skill or hourly rate or as to the nature and scope of the legal services rendered. **Lockett v. Sister-2-Sister Solutions, Inc., 60.**

**Motion to modify custody—reasonableness of attorney's hourly rate—judicial notice**—The trial court erred in denying plaintiff's request for attorney fees related to a child custody action based on the court's finding plaintiff failed to present sufficient evidence of the reasonableness of her attorney's hourly rates. A district court, considering a motion for attorney fees under N.C.G.S. § 50-13.6, was permitted, although not required, to take judicial notice of the customary hourly rates of local attorneys performing the same services and having the same experience. **Simpson v. Simpson, 320.**

**No statutory basis for award—failure to appear for subpoena**—An award of attorney fees as a contempt sanction against a non-party for failing to respond to a subpoena and appear at a deposition was remanded. The trial court found the non-party in contempt under N.C.G.S. § 1A-1, Rule 45(c), which did not authorize an award of attorney fees under the circumstances of this case. **First Mount Vernon Indus. Loan Ass'n v. Prodev XXII, LLC, 126.**

**ATTORNEYS**

**Disbarment—conditional reinstatement of right to practice law**—The North Carolina State Bar Disciplinary Hearing Commission (DHC) did not err by granting only a conditional reinstatement of defendant attorney's right to practice law rather than vacating the original order of disbarment. Defendant failed to appeal from the 6 August 2007 order vacating his disbarment. Further, DHC had the inherent authority to place the condition upon the vacation of its order of disbarment upon future actions of an appellate court. **N.C. State Bar v. Wood, 454.**

**Disciplinary action—convicted of criminal offense**—The North Carolina State Bar Disciplinary Hearing Commission did not err by disbarring defendant attorney in 2006 and reinstating this disbarment in 2009 based solely upon his conviction of criminal offenses even though no judgment of conviction had been entered against him. N.C.G.S. § 87-28(b)(1) provides that an attorney must be convicted of a criminal offense showing professional unfitness instead of requiring a judgment of conviction be entered. **N.C. State Bar v. Wood, 454.**

**CHILD CUSTODY AND SUPPORT**

**Personal jurisdiction—Japanese domestic law**—The trial court did not err in a child custody and child support case by denying defendant mother's motion to dismiss based on lack of personal jurisdiction even though defendant and the parties' children were in Japan. Defendant's due process rights were not offended because plaintiff father made a good faith effort to comply with Rule 4 and with the Hague Service Convention, translating the summons and forwarding his

**CHILD CUSTODY AND SUPPORT—Continued**

service request to the Central Authority of Japan within a reasonable time. Further, the Japanese clerk of court determined that service was proper under Japanese domestic law. **Hammond v. Hammond**, 616.

**Subject matter jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—home state**—The trial court did not err in a child custody and child support case by denying defendant mother's motion to dismiss based on lack of subject matter jurisdiction even though defendant and the parties' children were in Japan. The trial court properly concluded under the Uniform Child Custody Jurisdiction and Enforcement Act that North Carolina was the home state of the parties' minor children at the commencement of the custody action. **Hammond v. Hammond**, 616.

**CITIES AND TOWNS**

**Annexation—request for extension of sewer service on accelerated basis**—The trial court erred by granting petitioners' motion for summary judgment with respect to the sufficiency of respondent's plan to extend sanitary sewer service to the annexation areas on an accelerated basis to those petitioners who submitted requests. Respondent's actions were consistent with its existing policy which did not require it to pay to extend sewer service to petitioners. **Ashley v. City of Lexington**, 1.

**Annexation—sufficiency of metes and bounds descriptions**—The trial court erred by granting summary judgment in favor of petitioners on its claim that the legal description of the annexation area included in the ordinances were not sufficient metes and bounds descriptions as required by N.C.G.S. § 49(e)(1). The tax parcel identification numbers included in the ordinances contained all the information needed to both accurately identify and place the lots and the annexation areas' boundaries on the relevant tax maps and on the ground. Further, the trial court's order failed to show petitioners suffered any material prejudice. **Ashley v. City of Lexington**, 1.

**Involuntary annexation—statutory procedure and requirements**—The trial court did not err in an involuntary annexation case by concluding that respondent complied with statutory procedure and the requirements of N.C.G.S. §§ 160A-47(1), 160A-47(3)(b), and 160A-49(a), (b), and (e)(1). The imposition of taxes did not constitute material prejudice. Further, petitioners advanced no compelling argument that any procedural irregularities in the annexation process resulted in material prejudice. **Ashley v. City of Lexington**, 1.

**CIVIL PROCEDURE**

**Summary judgment—deposition not considered—no prejudice**—The trial court should have reviewed a deposition plaintiff attempted to offer in opposition to a motion for summary judgment, but there was no prejudice because plaintiff offered the deposition on a different issue and did not offer evidence that may have created a genuine issue of fact on the issue at hand. **Lockett v. Sister-2-Sister Solutions, Inc.**, 60.

**COLLATERAL ESTOPPEL AND RES JUDICATA**

**Due process and equal protection claims previously litigated—constitutionality of session laws previously justiciable**—The trial court did not err

**COLLATERAL ESTOPPEL AND RES JUDICATA—Continued**

by granting defendant county's motion for judgment on the pleadings based on *res judicata* and collateral estoppel. Plaintiff's claims for due process and equal protection had been previously litigated between plaintiff and the county, and a final decision on the merits dismissing these claims had been entered. Plaintiff should have raised the issues concerning the validity of the Brooklyn Village Contract and the county's actions in entering into the contract no later than *Reese III*. Further, the constitutionality of Session Laws 2000-65 and 2007-33 were justiciable at the time of *Reese I* and *Reese II*. **Reese v. Brooklyn Village, LLC, 636.**

**Pleadings—dispositive orders—scope of prior litigation between parties**—The trial court did not err by denying plaintiff's motion to strike the county's defenses of *res judicata* and collateral estoppel, and by denying plaintiff's motion to strike the pleadings and dispositive rulings from *Reese I*, *Reese II*, and *Reese III*. The defenses were determinative of the issues. Further, the pleadings and dispositive orders were necessary for a proper determination of the scope of prior litigation between the parties within the context of the defenses. **Reese v. Brooklyn Village, LLC, 636.**

**CONFessions AND INCRIMINATING STATEMENTS**

**Interrogation of juvenile defendant—initial invocation of rights—defendant initiated further conversation**—The trial court did not err by denying defendant's motion to suppress his incriminating statement to police officers because the statement was not obtained in violation of N.C.G.S. § 7B-2101. Although defendant initially invoked his right to have his mother present during his custodial interrogation, the evidence showed that defendant himself thereafter initiated further communication with the investigating officers. **State v. Williams, 441.**

**CONSTITUTIONAL LAW**

**Competency to stand trial—failure to inquire *sua sponte***—The trial court erred in a case involving multiple charges by failing to inquire *sua sponte* into defendant's competency. There was substantial evidence indicating that defendant was possibly mentally incompetent during her trial. The case was remanded to the trial court for a determination of whether it could conduct a meaningful retrospective hearing on the issue of defendant's competency at the time of her trial. **State v. Whitted, 522.**

**Effective assistance of counsel—argument not addressed**—The Court of Appeals did not address defendant's argument that he received ineffective assistance of counsel (IAC) in a satellite-based monitoring (SBM) hearing because the Court vacated both orders imposing SBM on defendant and IAC claims are not available in civil appeals such as from an SBM eligibility hearing. **State v. Miller, 466.**

**Effective assistance of counsel—failure to object to evidence**—Defendant was not deprived of his Sixth Amendment right to counsel in a robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon case by virtue of his trial attorney's failure to object to the admission of defendant's recorded video statement. Defendant opened the door to the admission of this evidence by his testimony and the record demonstrated that the matters of which defendant complained were matters of trial strategy. Defendant's request

**CONSTITUTIONAL LAW—Continued**

that the trial court dismiss his claims for ineffective assistance of counsel without prejudice to defendant's right to reassert this claim in a motion for appropriate relief was denied. **State v. Boyd, 418.**

**Effective assistance of counsel—no different result**—Defendant was not denied effective assistance of counsel in a case involving multiple charges where her trial attorney failed to make various objections or motions in five instances. The alleged errors did not alter the outcome of the trial. **State v. Whitted, 522.**

**Ex post facto prohibition—double jeopardy prohibition—satellite-based monitoring—civil regulatory scheme**—Defendant's argument that satellite-based monitoring (SBM) violates the *ex post facto* and double jeopardy prohibitions of the United States and North Carolina constitutions was overruled. The Court of Appeals was bound by the North Carolina Supreme Court's decision in *State v. Bowditch*, 364 N.C. 335, holding that the SBM program is a civil regulatory scheme that does not implicate constitutional protections against either *ex post facto* laws or double jeopardy. **State v. Miller, 466.**

**Fifth Amendment right against self-incrimination—Sixth Amendment right to counsel—no violation**—The trial court did not err by denying defendant's motion to suppress his incriminating statement to police officers where the statement was not obtained in violation of his Fifth or Sixth Amendment rights. Case law cited in defendant's brief involving "the utilization of coercive techniques" and "overbearing interrogation tactics" was not applicable in this case and, because defendant had not been formally charged with the robbery and murder at issue when detectives questioned him about those crimes, defendant's Sixth Amendment right to counsel had not yet attached when he was questioned by the detectives. **State v. Williams, 441.**

**Right to be present at trial—oral waiver—no error**—The trial court did not err in a case involving multiple charges by accepting defense counsel's oral waiver of defendant's right to be present at certain points during her trial because defendant voluntarily excused herself during certain portions of her trial. **State v. Whitted, 522.**

**Right to confrontation—expert testimony—analysis performed by non-testifying analyst—erroneous—no prejudicial error**—The trial court erred in a drugs case by permitting the State's expert witness to testify to the identity and weight of the substance seized during a search of defendant's apartment and vehicle where the expert's testimony was based upon an analysis performed by a non-testifying forensic analyst. However, in light of the additional evidence presented at trial and the Court's plain error review, the erroneously admitted testimony did not prejudice defendant such that the jury would have reached a different conclusion had the testimony not been admitted. **State v. Garnett, 537.**

**Right to fair trial—due process—trial court's comments about defendant's absence from courtroom**—Defendant was not deprived of a fair trial and due process in a felonious breaking or entering, felonious larceny, and possession of a firearm by a felon case even though defendant contended the trial court made improper comments about his absence from the courtroom. In light of the circumstances in which the comment was made, the trial court merely explained defendant's absence for the record. Even assuming *arguendo* that there was error, defendant failed to show that the jury would have reached a different result. **State v. McNeil, 654.**

**CONSTRUCTION CLAIMS**

**Construction defects—builder—individual liability**—The trial court erred in dismissing plaintiffs' claim for negligent construction against defendant builder in his individual capacity. As an individual member of a limited liability company, defendant builder was individually liable for his own torts, including negligence. **White v. Collins Bldg., Inc.**, 48.

**CONTEMPT**

**Failure to appear at deposition—civil rather than criminal**—A non-party appellant was held in civil rather than criminal contempt where he did not appear for a deposition after being subpoenaed, and the trial court held him in contempt under N.C.G.S. § 1A-1, Rule 45(e). The ultimate purpose of contempt under Rule 45(e) is to obtain compliance with subpoenas issued for the benefit of parties to a civil action. **First Mount Vernon Indus. Loan Ass'n v. Prodev XXII, LLC**, 126.

**Failure to respond to subpoena—findings—willfulness and lack of adequate excuse—distinguished**—The trial court did not err by finding a non-party in willful contempt for not appearing for a deposition after being served with a subpoena. Defendant's contention concerning the failure to find willful disobedience referred to contempt under N.C.G.S. § 5A-11(a)(3) rather than the basis for the court's findings, N.C.G.S. § 1A-1, Rule 45(e). Rule 45(e) refers to the lack of an adequate excuse, of which there was no evidence in this case. **First Mount Vernon Indus. Loan Ass'n v. Prodev XXII, LLC**, 126.

**Failure to respond to subpoena—non-party—sanctions**—The trial court erred by imposing attorney fees as a contempt sanction against a non-party who did not respond to a subpoena and appear at a deposition. Under the plain language of N.C.G.S. § 1A-1, Rules 45(e)(1) and 37(d), *parties* who fail to obey a subpoena without adequate cause are subject to sanctions. **First Mount Vernon Indus. Loan Ass'n v. Prodev XXII, LLC**, 126.

**CONTRACTS**

**Enforceability—at-will doctrine—erroneous ruling prejudicial**—There was prejudice from the court's erroneous ruling that the parties' employment contract was unenforceable where granting a new trial placed plaintiff in an improved position. **Lockett v. Sister-2-Sister Solutions, Inc.**, 60.

**CORPORATIONS**

**Dissolution of law firm—derivative action—individual claims**—The business court erred by granting partial summary judgment in favor of defendants on the basis of equitable estoppel, and the case was remanded to the business court for granting of summary judgment in favor of plaintiffs on the issue of judicial dissolution under N.C.G.S. § 57C-6-02, for a decree of dissolution, and directing the winding up of the law firm under N.C.G.S. § 57C-6-02.3. The business court also erred by granting defendants' motion for summary judgment dismissing plaintiffs' derivative claims for constructive fraud/breach of fiduciary duty and unfair and deceptive trade practices, and those claims were remanded for further proceedings. Further, the business court erred by ruling that defendants' counter-claims on behalf of the law firm for breach of fiduciary duty, conversion/misappropriation of law firm assets, unjust enrichment, constructive trust, equitable lien, and/or resulting trust, and breach of fiduciary duty/*ultra vires* were moot,

**CORPORATIONS—Continued**

and those claims were remanded for future proceedings. Defendants' counter-claims for breach of fiduciary duty and unjust enrichment could also go forward because the business court made no rulings on these counterclaims. **Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer**, 369.

**Piercing corporate veil—allegation not sufficient**—The trial court did not err by granting summary judgment for defendant Lockett on a breach of contract claim arising from plaintiff's employment termination. Plaintiff alleged that the corporate veil should be pierced to reach Lockett but did not provide a forecast of evidence to oppose defendant's motion. **Lockett v. Sister-2-Sister Solutions, Inc.**, 60.

**COSTS**

**Expert witness—time preparing, at trial, and testifying—travel expenses**—The trial court must include in an award of costs expert fees for time spent testifying (N.C.G.S. § 7A-305(d)), and has the discretion to award expert fees for time attending trial when not testifying (N.C.G.S. § 7A-314(d)) and travel expenses (N.C.G.S. § 7A-314(b)). However, there was no authority to assess costs for an expert's preparation time. **Springs v. City of Charlotte**, 271.

**COURTS**

**Public access to proceedings—no compelling countervailing public interests**—Judge Culler's order denying plaintiff's motion to close the proceedings in a domestic case did not impermissibly overrule Judge Owens' previously entered order sealing the documents filed in the domestic case. Moreover, Judge Culler correctly ruled that there were no compelling countervailing public interests as related to these parties which outweighed the public's right of access to open court proceedings. **France v. France**, 406.

**CRIMINAL LAW**

**Denial of requested jury instruction—not supported by evidence or law**—The trial court did not abuse its discretion in an accessory after the fact case by denying defendant's request to instruct the jury on "mere presence" and the meaning of "malice." The requested instructions were not supported by the evidence and were not appropriate under the law. **State v. Cole**, 84.

**Jury instruction—flight—consciousness of guilt**—The trial court did not err by instructing the jury on flight as evidence of consciousness of guilt. The evidence was sufficient to show that defendant fled the scene after commission of the crime and took steps to avoid apprehension. **State v. Bonilla**, 576.

**Prosecutor's arguments—comparing defendant to an animal**—The trial court did not err in a first-degree murder case by failing to intervene *ex mero motu* to address several of the prosecutor's remarks during the State's closing argument. Although comparisons between criminal defendants and animals are disfavored, the use of the analogy in context helped explain the complex legal theory surrounding premeditation and deliberation. **State v. Oakes**, 18.

**Prosecutor's argument—defendant's prior convictions—plain error analysis**—The trial court did not commit plain error in an accessory after the fact case by failing to intervene *ex mero motu* when the prosecutor referenced defendant's prior convictions during her closing statement. Viewed in the context

**CRIMINAL LAW—Continued**

in which they were made and in light of the overall factual circumstances to which they referred, the references did not so infect the trial that they rendered the conviction fundamentally unfair. **State v. Cole, 84.**

**DAMAGES AND REMEDIES**

**Punitive—JNOV denied—no written opinion**—A punitive damages award in an automobile accident case was remanded where defendants' motion for a judgment notwithstanding the verdict was denied without a written opinion stating the reasons for upholding the final award, as required by N.C.G.S. § 1D-50. **Springs v. City of Charlotte, 271.**

**Restitution—sufficiency of evidence—amount of award**—The trial court erred in a felonious breaking or entering, felonious larceny, and possession of a firearm by a felon case by ordering defendant to pay \$217.40 in restitution because the State failed to present evidence supporting the amount of the award. **State v. McNeil, 654.**

**DECLARATORY JUDGMENTS**

**Disposition of property—motion to dismiss—enforceability of agreements**—The trial court did not err in a declaratory judgment action regarding the disposition of property by granting defendant company's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) because the agreements between defendants were lawful and enforceable. **Reese v. Brooklyn Village, LLC, 636.**

**DISCOVERY**

**Hearing date—sufficient time allowed—discovery not closed**—Plaintiffs were not prevented from utilizing any necessary discovery procedures by a continuance of discovery for only 45 days. Plaintiffs' conduct following the continuance belied the need for additional time; furthermore, setting a date for the summary judgment hearing did not close the discovery period. **Sapp v. Yadkin Cnty., 430.**

**Time—local rules**—The trial court did not err by granting plaintiffs' motion to continue discovery for only 45 days instead of 120. The local rule allowing 120 days for completion of discovery does not entitle a party to a mandatory 120 day period. **Sapp v. Yadkin Cnty., 430.**

**DIVORCE**

**Alimony—duration—findings—not sufficient**—An alimony award was remanded for further findings regarding the duration of the payments and the health insurance coverage where the award was ambiguous as to termination and did not include findings explaining the reason for the duration chosen. **Lucas v. Lucas, 492.**

**Alimony—health insurance**—The trial court could include the maintenance of health insurance in an alimony award since health insurance is indistinguishable from other types of insurance that have been recognized as permissible forms of support and maintenance. **Lucas v. Lucas, 492.**

**Alimony—health insurance—findings**—An alimony award that included health insurance was remanded where the findings were not sufficient to allow the reviewing court to determine whether the trial judge exercised proper discretion. **Lucas v. Lucas, 492.**

**DIVORCE—Continued**

**Alimony—marital misconduct—findings not sufficient**—An award of alimony was remanded for further findings regarding marital misconduct where the order and judgment did not specify the type of marital misconduct the court had found. **Lucas v. Lucas, 492.**

**Equitable distribution—distribution amounts—not sufficient**—An equitable distribution award was remanded for further findings as to the distribution amounts where the appellate court had difficulty determining how the figures were derived. **Lucas v. Lucas, 492.**

**Equitable distribution—unequal distribution—findings that equal division not equitable—not sufficient**—An equitable distribution judgment lacked adequate findings of fact where the trial court found that “an unequal distribution of marital property is equitable” rather than that “an equal division by using net value of marital property” is not equitable. In order to divide a marital estate other than equally, the trial court must first find that an equal division is not equitable and explain why. **Lucas v. Lucas, 492.**

**DRUGS**

**Jury instructions—controlled substances—variance between indictment and instruction—no prejudicial error**—The trial court did not commit reversible error in a drugs case where the pertinent indictment charged defendant with maintaining a dwelling house “for keeping and selling a controlled substance” but the court instructed the jury that to find defendant guilty of the charge, the State must prove that Defendant “maintained a dwelling house used for the purpose of unlawfully keeping or selling marijuana.” *State v. Lancaster*, 137 N.C. App. 37, was controlling. **State v. Garnett, 537.**

**EMINENT DOMAIN**

**Condemnation—creation of gas transmission and distribution system—public use test—public benefit test—standing**—The trial court did not err by granting summary judgment in favor of plaintiff town based on its conclusion that the town lawfully exercised its eminent domain power. The town may acquire property by condemnation to establish a gas transmission and distribution system, even in the absence of a concrete, immediate plan to furnish gas service to its citizens. The condemnation passed the public use and public benefit tests. Property owners did not have standing to assert N.C.G.S. § 153-15 as a defense to the condemnations. Further, the Cabarrus County Voluntary Agriculture District did not bar the town’s exercise of its condemnation power. Finally, condemnor was not required to specifically state each and every intended use of the property. **Town of Midland v. Morris, 208.**

**EMPLOYER AND EMPLOYEE**

**Wage and Hour Claim—summary judgment for defendant**—The trial court did not err by granting summary judgment for defendant Lockett on a Wage and Hour claim arising from plaintiff’s employment termination where plaintiff did not offer evidence to support the existence of a genuine issue of material fact. **Lockett v. Sister-2-Sister Solutions, Inc., 60.**

**ESTOPPEL****Equitable estoppel—assertion of products liability statute of repose—**

The trial court did not err by concluding that defendant tire company was not equitably estopped from asserting that plaintiffs' products liability claims were barred by the statute of repose. Plaintiffs failed to point to any evidence showing that they relied on defendant's conduct in delaying the filing of their suit.

**Robinson v. Bridgestone/Firestone N. Am. Tire, L.L.C., 310.**

**EVIDENCE**

**Admission of prior unsworn statement—corroborative—probative value not substantially outweighed by prejudice—**The trial court did not err in a first-degree murder trial by admitting into evidence the prior unsworn statement of the deceased victim's sister where the statement was being used to corroborate the testimony of the witness who originally made the statement. Furthermore, defendant failed to show that the probative value of the statement was substantially outweighed by the risk of unfair prejudice. **State v. Walters, 158.**

**Admission of video—opened door to introduction—no plain error—**The admission of defendant's recorded video statement in a robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon case did not amount to plain error where defendant opened the door to the introduction of the video. **State v. Boyd, 418.**

**Detective—opinion testimony—police investigative process—plain error analysis—**The trial court did not commit plain error in an accessory after the fact case by allegedly admitting improper opinion evidence from a detective. The testimony was rationally based on his perception and experience about police procedure. Further, the pertinent testimony was helpful to the fact finder to understand the investigative process. **State v. Cole, 84.**

**Exhibit—chemical analysis of blood—expert testimony—**The trial court did not commit plain error by admitting into evidence State's exhibit number 19, the results of the chemical analysis of defendant's blood, and an expert's testimony based on those results. Defendant did not allege that the test, indicating that defendant still had a blood alcohol concentration of 0.14 more than three hours after the accident, was improperly administered. The fact that three hours had passed went to the weight to be given to the test rather than its admissibility. **State v. Patterson, 708.**

**Forensic computer expert—disposal of evidence—**There was no plain error in a prosecution for statutory rape and related offenses in allowing the State's forensic computer expert, who had found nothing illicit in his examination of defendant's computer equipment, to answer hypothetical questions about disposing of or hiding evidence. The testimony was in the scope of his expertise and did not invade the province of the jury. Moreover, the evidence of defendant's guilt was overwhelming. **State v. Jennings, 329.**

**Hypothetical—lay witness—foundation for opinion absent—**The trial did not abuse its discretion in a prosecution for felony death by vehicle by precluding defendant from testifying about whether he would have been able to stop his car had the brakes worked properly. The question was a hypothetical, but there was no foundational evidence of defendant's perception of his ability to stop the car under the hypothetical circumstances. **State v. Ziglar, 461.**

**EVIDENCE—Continued**

**Judicial notice—Utilities Commission order—public documents**—Plaintiff town's motion to take judicial notice of a Utilities Commission order allowing joint motion for approval of settlement and abandonment of service was granted because it was an important public document. However, its motion to take judicial notice of actions of Piedmont Natural Gas, Monroe, and Mooresville were declined. **Town of Midland v. Morris, 208.**

**Opinion testimony—alcohol concentration at various times and scenarios**—The trial court did not err in a driving while impaired case by allowing an expert witness to testify about defendant's alcohol concentration at various times and under various scenarios. The opinion testimony went to the weight of the evidence to be considered rather than its admissibility. **State v. Green, 669.**

**Opinion testimony—post-driving consumption of alcohol—relevancy**—The trial court did not err in a driving while impaired case by allowing an expert witness to give opinion testimony regarding defendant's post-driving consumption of alcohol because it did not amount to an opinion about defendant's credibility. Instead, it served to assist the jury in determining whether defendant's blood alcohol content was in excess of the statutory limit imposed under N.C.G.S. § 20-138.1(a)(2). **State v. Green, 669.**

**Physician's testimony—explanation of lack of physical evidence**—There was no plain error in a prosecution for statutory rape and related offenses in a physician testifying that it was probable that a tear in the victim's hymen would have healed by the time she saw the victim. This was not an impermissible opinion about the victim's credibility, but an explanation of the lack of physical findings indicating sexual abuse. Moreover, the evidence against defendant was overwhelming. **State v. Jennings, 329.**

**Prior crimes or bad acts—criminal record—plain error analysis**—The trial court did not commit plain error in an accessory after the fact case by admitting evidence referencing defendant's criminal record. Although the pertinent testimony was not admitted for one of the proper purposes under N.C.G.S. § 8C-1, Rule 404(b), it did not rise to the level of plain error since it was not offered to prove his character. **State v. Cole, 84.**

**Public file—motion in limine—admission unduly prejudicial—no abuse of discretion**—The trial court did not abuse its discretion in a medical malpractice case by granting defendants' motion *in limine* precluding the admission of Dr. Rudisill's North Carolina State Medical Board public file. The evidence was unduly prejudicial and could have potentially misled the jury pursuant to N.C.G.S. § 8C-1, Rule 403. **Davis v. Rudisill, 587.**

**Recording in Spanish—failure to show abuse of discretion or prejudice**—The trial court did not abuse its discretion by allowing a phone call recording in Spanish between defendant and another person to be played for the jury. Defendant failed to show any actual prejudice. Further, defendant did not argue that the written translation differed in any way from the recording and did not identify how a Spanish-speaking juror might interpret the recording differently from the written translation. **State v. Gomez, 611.**

**Relevance—admission—no prejudice**—The trial court did not err in a second-degree murder case by admitting evidence regarding the manner in which defend-

**EVIDENCE—Continued**

ant's mother obtained Oxymorphone pills where defendant failed to articulate how this evidence prejudiced his trial. **State v. Parlee, 144.**

**Video recording—coparticipant interrogation**—The trial court did not commit plain error in a first-degree murder case by admitting a video recording of another coparticipant's interrogation. Even without the recorded testimony, the jury was presented with substantial evidence of defendant's guilt. It was not likely that a jury would have reached a different verdict absent admission of this evidence. **State v. Johnson, 682.**

**Written statement of coparticipant—corroboration**—The trial court did not err in a first-degree murder case by admitting the written statement of a coparticipant. The statement was not hearsay because it was admitted to corroborate the coparticipant's trial testimony. **State v. Johnson, 682.**

**FALSE PRETENSE**

**Renting out another's house—evidence sufficient**—There was sufficient evidence that defendant obtained property by false pretenses by purporting to rent a house that he did not own. Although defendant argued that the two renters were not deceived because defendant told them not to let anyone know that they were staying at the house, evidence not favorable to the State is not considered when ruling on a motion to dismiss. **State v. Moore, 551.**

**FIREARMS AND OTHER WEAPONS**

**Possession of firearm by felon—motion to dismiss—sufficiency of evidence—constructive possession of gun**—The trial court did not err by denying defendant's motion to dismiss the charge of possession of a firearm by a felon even though defendant contended there was insufficient evidence that he had possession of a gun found in a clothes hamper. Defendant had a specific connection to the place where the gun was found, he behaved suspiciously, and he was aware of the gun's presence at the victim's home. Further, the State's evidence of other incriminating circumstances established that defendant constructively possessed the gun. **State v. McNeil, 654.**

**HOMICIDE**

**First-degree murder—motion to dismiss—sufficiency of evidence—intent to kill**—The trial court did not err by failing to dismiss the charge of first-degree murder. The facts indicated that the manner of death was a result of the intentional acts of beating, suffocating, and binding the victim so tightly that it broke his spine. **State v. Bonilla, 576.**

**First-degree murder—predicate felony—first-degree kidnapping**—The trial court did not err by instructing the jury that they could consider, as a predicate felony to murder, that defendant killed during the perpetration of first-degree kidnapping. **State v. Bonilla, 576.**

**Second-degree murder—sufficient evidence**—The trial court did not err by failing to dismiss the charge of second-degree murder as there was sufficient evidence of all elements of the charge, including (1) malice; (2) that defendant's actions proximately caused the victim's death; and (3) that the victim "ingested" the Oxymorphone pill. **State v. Parlee, 144.**

**IDENTIFICATION OF DEFENDANTS**

**Motion to dismiss—sufficiency of evidence—perpetrator of crime**—The trial court did not err by denying defendant's motion to dismiss the charge of felonious breaking or entering based on alleged insufficient evidence that defendant was the perpetrator of the crime. The victim recognized defendant from a distance at the scene of the crime because she was familiar with him, and law enforcement was able to identify defendant's automobile. **State v. McNeil, 654.**

**Surveillance video—no plain error**—The trial court did not commit plain error in a case involving multiple charges by permitting a detective to identify defendant as the person depicted in surveillance videos. Even if the admission of the testimony was error, it was not an exceptional, fundamental error which resulted in a miscarriage of justice or altered the jury's verdict. **State v. Whitted, 522.**

**INDICTMENT AND INFORMATION**

**Felony obstruction of justice—elevation of charge from misdemeanor to felony—subject matter jurisdiction**—The superior court had subject matter jurisdiction to accept defendant's guilty plea to felony obstruction of justice. The indictment on its face was sufficient to elevate the charge from a misdemeanor to a felony under N.C.G.S. § 14-3. **State v. Blount, 340.**

**Variance in underlying felony offense—subject matter jurisdiction—notice—accessory after the fact**—The trial court had subject matter jurisdiction to try defendant and enter judgment against him for accessory after the fact to second-degree murder even though the indictment listed the charge as accessory after the fact to first-degree murder. The indictment provided defendant with adequate notice to prepare his defense and to protect him from double jeopardy. The elements of the underlying felony themselves were not essential elements of the crime of accessory after the fact. **State v. Cole, 84.**

**JUDGES**

**Recusal denied—no personal interest or preference**—The trial court did not err by denying a motion to recuse where the case involved rezoning for a new jail and the judge had previously issued show cause orders involving jail conditions and the construction of a new jail “with all deliberate speed.” There was nothing to indicate that the judge's desire for a prompt resolution of the jail issue was personal or that he had any preference or opinion on the location of the new jail. **Sapp v. Yadkin Cnty., 430.**

**JURISDICTION**

**Forum selection clause—letter of credit transactions independent**—The trial court did not err by denying defendant French Bank's motion to dismiss plaintiff's claims based on a forum selection clause contained in a supplemental guarantee requiring that all litigation take place in Geneva, Switzerland. Defendant conceded that no agreement existed between the two parties containing a forum selection clause even though defendant contended that it should be deemed a third-party beneficiary. Contracts relating to a letter of credit transaction are independent, and thus, the supplemental agreement from plaintiff to defendant Swiss Bank was separate and distinct from the demand guarantee from defendant Swiss Bank to defendant French Bank. **Speedway Motorsports Int'l, Ltd. v. Bronwen Energy Trading, Ltd., 564.**

**JURISDICTION—Continued**

**Personal—incorporation by reference clause—forum selection clause—**The trial court erred by denying defendant Swiss Bank's motion to dismiss based on lack of personal jurisdiction. The "incorporation by reference" clause in plaintiff's agreement with defendant could not reasonably be construed as subjecting defendant to the forum selection clause when it was intended to identify the contracts that were the subject of the demand guarantee being issued by defendant for plaintiff. **Speedway Motorsports Int'l, Ltd. v. Bronwen Energy Trading, Ltd., 564.**

**Personal—long arm statute—minimum contacts—due process—**The trial court did not have personal jurisdiction over defendant Swiss Bank under the North Carolina long arm statute when there were insufficient minimum contacts, and thus, there was no need to address whether exercising jurisdiction over defendant would satisfy the requirements of due process under the Fourteenth Amendment. **Speedway Motorsports Int'l, Ltd. v. Bronwen Energy Trading, Ltd., 564.**

**Standing—derivative claims—individual claims—**The business court's summary judgment rulings on standing in a case concerning the operation and breakup of a law firm were affirmed and reversed. Plaintiffs had standing to bring their derivative claims, but not their individual claims. Defendants had standing to bring their counterclaims on behalf of the law firm, but not their individual counterclaims. **Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer, 369.**

**Subject matter—district court—satellite-based monitoring order—**The district court lacked subject matter jurisdiction to order defendant to enroll in lifetime satellite-based monitoring because N.C.G.S. § 14-208.40B(b) requires that hearings pursuant thereto be held in superior court for the county in which the offender resides. **State v. Miller, 466.**

**Subject matter—juvenile court versus civil court—child neglect—child custody—attorney fees—Chapter 7B juvenile proceeding—Chapter 50 civil action—**The trial court lacked subject matter jurisdiction to enter its 7 August 2009 and 23 October 2009 orders regarding child custody and attorney fees in a Chapter 50 civil action between private parties. The orders were vacated and remanded to the district court based on a failure to comply with N.C.G.S. § 7B-911 in terminating the jurisdiction of the juvenile court obtained from the initial juvenile neglect proceeding. Upon remand, the case remained within the jurisdiction of the juvenile court unless and until the juvenile court terminated its jurisdiction in compliance with N.C.G.S. § 7B-911 and entered a civil custody order in compliance with N.C.G.S. § 50-13.1, *et seq.* **Sherrick v. Sherrick, 166.**

**Subject matter—order entered after appeal—trial court divested of jurisdiction—**A trial judge's order granting movant's request to have the proceedings in a domestic action open to the public was a nullity where the order was entered after plaintiff's appeal from the trial judge's first order denying plaintiff's motion to have the proceedings in the action closed. The trial court was without jurisdiction to hear movant's motion because jurisdiction in the matter had transferred to the Court of Appeals. **France v. France, 406.**

**Subject matter—superior court—satellite-based monitoring—**The superior court lacked subject matter jurisdiction to order defendant to enroll in lifetime

**JURISDICTION—Continued**

satellite-based monitoring (SBM). Because the district court's order purporting to order defendant to enroll in SBM was from a civil proceeding, the superior court lacked subject matter jurisdiction to hear defendant's appeal from it. **State v. Miller, 466.**

**JURY**

**Instructions—continue deliberations—pattern jury instruction—language of statute—no abuse of discretion**—The trial court did not abuse its discretion by instructing the jury to continue its deliberations using North Carolina Pattern Jury Instruction 101.40 rather than the language of N.C.G.S. § 15A-1235. Defendant failed to show a discrepancy between the substance of the pattern instruction and N.C.G.S. § 15A-1235. **State v. Walters, 158.**

**Question—discretion exercised in response**—The trial court properly exercised its discretion in denying the jury's request to review particular testimony by stating that the court lacked the capability to provide "realtime" transcripts and that they would have to rely on their recollections. **State v. Starr, 106.**

**Voir dire—limitations—failure to show prejudice**—The trial court did not err in a first-degree murder case by limiting defendant's jury *voir dire*. Even assuming *arguendo* that any limitations were improper, defendant failed to show that he was prejudiced. **State v. Johnson, 682.**

**JUVENILES**

**Delinquency—assault on government officer—sufficiency of findings of fact**—The Court of Appeals granted a juvenile's petition for writ of *certiorari* and concluded that the trial court erred by failing to make sufficient findings of fact under N.C.G.S. § 7B-2411 to support the conclusion that the juvenile committed the offense of assault on a government officer. The case was remanded for additional findings. **In re J.V.J., 737.**

**Delinquency—indecent liberties between children—sufficient evidence**—The trial court did not err in adjudicating respondent juvenile delinquent for having committed indecent liberties between children because the State presented substantial evidence of all the essential elements of the crime, including that the juvenile acted with a purpose to arouse or gratify his sexual desires in committing the act alleged. **In re A.W., 596.**

**Delinquency—second degree sexual assault—insufficient evidence**—The trial court erred in adjudicating respondent juvenile delinquent for having committed second degree sexual assault because the State presented no evidence that the victim had any mental limitations that would satisfy the statutory definitions of 'mentally disabled' or 'mentally incapacitated,' as defined in N.C.G.S. § 14-27.1(1) and (2), or that he was physically helpless, as defined in N.C.G.S. § 14-27.1(3). **In re A.W., 596.**

**Delinquency petition—variance of date of offense—no prejudice**—Respondent juvenile's argument that the petition for indecent liberties between children should have been dismissed because there was a discrepancy between the date upon which the offense was alleged to have occurred and that shown by the evidence was overruled. The juvenile made no showing as to how his ability to present an adequate defense was prejudiced by the variance. **In re A.W., 596.**

**JUVENILES—Continued**

**Delinquency proceeding—counsel denied opportunity to make closing argument—adjudication vacated**—The trial court erred by making the determination to adjudicate the juvenile respondent delinquent for having committed the charged offenses without giving his counsel the opportunity to make a closing argument. The adjudication that the juvenile was delinquent for having committed the misdemeanor offense of indecent liberties between children was vacated. **In re A.W., 596.**

**LARCENY**

**Felony larceny—fatally defective indictment—failure to allege ownership of handgun**—The trial court erred by entering judgment for felony larceny. The indictment was fatally defective because it failed to allege ownership of the 9 mm handgun. **State v. McNeil, 654.**

**LOANS**

**Liability under note—declaratory judgment requested—preferable forum—choice-of-law—dismissal**—The trial court did not err by dismissing plaintiffs' claim for relief requesting that the trial court declare the nonexistence of their personal liability under an adjustable rate balloon note. The plain language of plaintiffs' brief suggested that plaintiffs' decision to file the present action in this jurisdiction was merely a strategic maneuver to achieve a preferable forum or, at a minimum, was an attempt to circumvent a choice-of-law provision agreed to by the parties which would otherwise subject them to the laws of the State of Florida. **Poole v. Bahamas Sales Assoc., LLC, 136.**

**KIDNAPPING**

**Dead victim not released in safe place—waiver of double jeopardy argument**—The trial court did not err by concluding that the first-degree kidnapping offense committed on the deceased victim should not be vacated. Contrary to defendant's argument, a person killed during the course of a kidnapping was not released in a safe place. Further, defendant waived his double jeopardy argument by failing to raise it at trial. **State v. Bonilla, 576.**

**Jury instruction—plain error analysis—terrorizing—serious bodily harm**—The trial court did not commit plain error by instructing the jury on the charges of kidnapping. The trial court's instruction appropriately defined "terrorizing" and "serious bodily harm" as required for guilt of the offense of kidnapping under N.C.G.S. § 14-39. **State v. Bonilla, 576.**

**Jury instruction—plain error analysis—terrorizing the victim**—The trial court did not commit plain error by instructing the jury to consider kidnapping for the purpose of terrorizing the victim. **State v. Bonilla, 576.**

**Motion to dismiss—sufficiency of evidence—purpose to terrorize or inflict serious bodily harm—sexual assault**—The trial court did not err by denying defendant's motion to dismiss the charge of kidnapping the surviving victim. The evidence was sufficient to show that defendant's purpose was to terrorize or inflict serious bodily harm. Defendant conceded that in the light most favorable to the State, the purpose of confining and restraining the victim was to sexually assault him. **State v. Bonilla, 576.**

**KIDNAPPING—Continued**

**Motion to dismiss—sufficiency of evidence—purpose to terrorize or inflict serious bodily harm—suffocation—strangulation**—The trial court did not err by denying defendant's motion to dismiss the charge of kidnapping the deceased victim. The evidence was sufficient to show that defendant's purpose was to terrorize or inflict serious bodily harm including suffocation, strangulation, fracture of the spine, and death. **State v. Bonilla**, 576.

**MEDICAL MALPRACTICE**

**Causation—compartment syndrome—genuine issue of material fact**—The trial court erred by granting summary judgment in favor of defendants in a medical malpractice case where the evidence established a genuine issue of material fact as to the cause of plaintiff's compartment syndrome. **Perry v. Presbyterian Hosp.**, 96.

**Causation—expert's testimony contradictory—summary judgment**—The trial court did not err by granting summary judgment for defendants in a medical malpractice action where plaintiffs did not forecast evidence showing proximate cause. There were conflicts between the deposition and affidavits of plaintiffs' expert that left the trial court with an issue of credibility, not a genuine issue of material fact. **Cousart v. Charlotte-Mecklenburg Hosp. Auth.**, 299.

**Causation—sufficiency of the evidence**—There was sufficient evidence of causation in an automobile accident case to deny defendants' motion for a directed verdict and send the case to the jury where defendants contended that a preexisting condition made the evidence of causation speculative. Taking the evidence in the light most favorable to plaintiff, an expert who had been one of plaintiff's treating physicians considered the possible causes of plaintiff's condition and, based on his review of the facts, plaintiff's history, and his treatment of plaintiff, testified to a reasonable degree of medical certainty that the accident caused or aggravated plaintiff's condition. Conflicts in the evidence are for the jury. **Springs v. City of Charlotte**, 271.

**Motion for new trial denied—costs awarded defendant—no abuse of discretion**—The trial court did not abuse its discretion in a medical malpractice case by denying plaintiff's motion for a new trial filed pursuant to N.C.G.S. § 1A-1, Rule 59 and subsequently awarding costs to defendant. **Davis v. Rudisill**, 587.

**MENTAL ILLNESS**

**Involuntary commitment hearing—waiver of counsel**—Respondent's waiver of counsel at an involuntary commitment hearing was ineffective, and the resulting commitment order was vacated, where the trial court did not comply with the statutory mandates of N.C.G.S. § 15A-1242, N.C.G.S. § 122C-168(d), and IDS Rule 1.6. There was nothing in the record indicating that the trial court conducted a thorough inquiry that showed that defendant was literate and competent, the facts should have caused the trial court to question whether to preclude self-representation for respondent, and there was nothing in the record to indicate a thorough inquiry that showed that respondent understood and appreciated the consequences of his decision, the nature of the proceedings, and the commitment he was facing. **In re Watson**, 507.

**MORTGAGES AND DEEDS OF TRUST**

**Anti-deficiency statute—action brought prematurely—dismissal proper—**The trial court did not err by dismissing plaintiffs' claim for relief based on defendants' alleged violation of N.C.G.S. § 45-21.38, the "anti-deficiency" statute, pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). Where plaintiffs' injury was merely theoretical or anticipated, the action was brought prematurely. **Poole v. Bahamas Sales Assoc., LLC, 136.**

**MOTOR VEHICLES**

**Driving while impaired—second-degree murder—felony serious injury by vehicle—legal impairment—**The trial court did not err by denying defendant's motion to dismiss the charges of second-degree murder, felony serious injury by vehicle, and driving while impaired based on alleged insufficient evidence that defendant was legally impaired at any relevant time after driving. In addition to other evidence, the State showed that defendant was under the influence of an impairing substance at the time of the accident based on a chemical analysis of his blood, defendant admitted consuming as many as five or six beers, and defendant's speed exceeded 100 miles per hour with defendant failing to use his brakes or making any attempt to avoid the collision. **State v. Patterson, 708.**

**Felony speeding to elude arrest—aggravating factor—driving while license revoked—jury instruction correct—**The trial court did not err in instructing the jury that the factor of driving while license revoked under N.C.G.S. § 20-11.5(b)(5) in aggravation of the offense of felony speeding to elude arrest did not require a showing that defendant was on a highway or street. The aggravating factor does not require the same proof as the offense of driving while license revoked under N.C.G.S. § 20-28(a). **State v. Dewalt, 187.**

**Felony speeding to elude arrest—lesser-included offense—no jury instruction required—**The trial court did not err in denying defendant's request for a jury instruction on the lesser-included offense of misdemeanor speeding to elude arrest. The State presented uncontroverted evidence as to each element of speeding to elude arrest and the presence of two listed aggravating factors required to make this offense a felony. **State v. Dewalt, 187.**

**NEGLIGENCE**

**Car striking utility pole—duty of City—proximate cause—**The trial court properly granted summary judgment for defendant City in a negligence claim that arose from a single car accident in which plaintiffs' decedent was killed when the car in which she was a passenger struck a utility pole on a highway and a red-light camera fell onto and collapsed the car roof. The City did not have an affirmative or contractual duty to plaintiffs to maintain the highway in a safe condition for decedent, and the intervening negligence of the driver was the proximate cause of decedent's injuries. **Kennedy v. Polumbo, 394.**

**Contributory negligence—riding with impaired driver—**The trial court properly granted summary judgment for the City and the owner and operator of a red-light camera where plaintiffs' decedent was killed in an automobile accident when the car in which she was a passenger struck a utility pole and a red-light camera collapsed the roof of the car directly above decedent. The deceased was contributorily negligent in voluntarily riding with an appreciably impaired driver. **Kennedy v. Polumbo, 394.**

**PARTIES**

**Individual never made party—default judgment erroneous**—The trial court erred in an action arising from a construction dispute by entering a default judgment against Bobby Honeycutt individually because he was never a party to the action. While defendants' counterclaim asserted that Bobby Honeycutt used Honeycutt Contractors, Inc. as a mere instrumentality and sought to pierce the corporate veil, defendants never joined Bobby Honeycutt individually as a third-party defendant to the action. **Honeycutt Contractors, Inc. v. Otto, 180.**

**Motion to amend—substitution of a misnomer—correction to name of party served**—The trial court did not abuse its discretion by allowing plaintiffs' motion to amend to substitute "Van Duncan, Sheriff of Buncombe County" for "Buncombe County Sheriff's Department," or by denying defendant's motions to dismiss even though defendants contended that defendant Sheriff's Department was not a legal entity subject to suit. Substitution in the case of a misnomer was not considered substitution of new parties, but a correction in the description of the party actually served. The various summonses were all served on the appropriate party, and defendant sheriff had notice that he was the target of a lawsuit dating back to the original claim. **Treadway v. Diez, 152.**

**PLEADINGS**

**Answer—leave to amend granted—no abuse of discretion**—The trial court did not abuse its discretion in a medical malpractice case by allowing defendants to amend their answer during trial. There was no undue delay in the amendment simply because the amendment took place during trial and, given the evidence presented during discovery and then at trial, plaintiff could not show prejudice. **Davis v. Rudisill, 587.**

**PROBATION AND PAROLE**

**Driver's license forfeiture—findings of fact—written order**—The trial court did not err in a probation revocation proceeding by making findings of fact and entry of judgment in a written order on form AOC-CR-317. N.C.G.S. § 15A-1331A did not require the trial court to announce its judgment in open court in addition to entry of a written order and the trial court was not required to announce all of the findings and details of its judgment in open court. **State v. Kerrin, 72.**

**Driver's license forfeiture—insufficient findings of fact—matter remanded**—The trial court erred in a probation revocation proceeding by ordering the forfeiture of defendant's driver's license where the trial court failed to make the findings of fact required by N.C.G.S. § 15A-1331A(b)(2) to support the order. The order did not include a finding concerning whether defendant failed to make reasonable efforts to comply with the conditions of probation. As there was evidence in the record from which the trial court could have made this finding, the matter was remanded to the trial court. **State v. Kerrin, 72.**

**Driver's license forfeiture—term not to exceed original probation term**—The trial court committed reversible error by suspending defendant's driver's license for 24 months from the date of her probation revocation hearing when only 6 1/2 months of her probationary period remained. A court which revokes a defendant's probation may order a forfeiture of an individual's driver's license pursuant to N.C.G.S. § 15A-1331A(b)(2) at any time during the individual's proba-

**PROBATION AND PAROLE—Continued**

tion term, but the specific term of forfeiture cannot exceed the individual's original probation term as set by the sentencing court at the time of conviction. **State v. Kerrin**, 72.

**Order—remanded—clerical correction**—The Court of Appeals remanded an order revoking defendant's probation for correction of clerical errors. **State v. Kerrin**, 72.

**ROBBERY**

**Dangerous weapon—conspiracy—sufficient evidence**—The trial court did not err in denying defendant's motion to dismiss the charges of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon because the State presented sufficient evidence of all elements of the crimes and of defendant's identity as the perpetrator. **State v. Boyd**, 418.

**SEARCH AND SEIZURE**

**Motion to suppress evidence—reasonable suspicion—probable cause with exigent circumstances—intrusive search**—The trial court did not err in a drugs case by denying defendant's motion to suppress evidence based on its conclusion that the search of defendant's person and seizure of evidence was valid. The investigator had reasonable suspicion to stop defendant and probable cause with exigent circumstances to conduct a full search of defendant's person. Defendant was in possession of illegal narcotics and was attempting to destroy the drugs by swallowing them. Further, there was no intrusive search of defendant's person. **State v. Williams**, 255.

**Standing—passenger in vehicle—no possessory interest**—The trial court did not err in concluding that defendant lacked standing to challenge the search of a vehicle in which he was a passenger and in denying his motion to suppress evidence obtained from the search. Defendant did not own the vehicle and he asserted no possessory interest in the vehicle or its contents. **State v. Mackey**, 116.

**Traffic stop—motion to suppress evidence—good faith mistake of identity—reasonable articulable suspicion—informant tips—revoked driver's license**—The trial court did not err in a drugs case by denying defendant's motion to suppress evidence based on its conclusion that officers had a reasonable and articulable suspicion for stopping defendant's vehicle despite the investigator's good faith mistake as to the identity of the driver. Officers had a good faith belief that defendant's driver's license was revoked, in addition to the totality of the information from three confidential informants concerning defendant's possession and sale of illegal narcotics. **State v. Williams**, 255.

**Traffic stop—motion to suppress evidence—reasonable suspicion—probable cause**—The trial court did not err in a driving while impaired case by denying defendant's motion to suppress evidence obtained as a result of a stop and arrest. The stop by the officers was based on reasonable suspicion and the arrest was based on probable cause. Further, even if the stop and arrest violated N.C.G.S. § 15A-402 based on a university police officer making the stop outside of his statutory jurisdiction, it did not rise to the level of a substantial violation. **State v. Scruggs**, 725.

**SEARCH AND SEIZURE—Continued**

**Traffic stop—no reasonable suspicion—motion to suppress improperly denied**—The trial court erred in a driving while impaired case by denying defendant's motion to suppress evidence because the officers did not have reasonable suspicion to stop defendant's vehicle. **State v. Chlopek, 358.**

**SENTENCING**

**Aggravating factor—breath alcohol concentration of 0.16 or greater—no Blakely error**—The trial court did not err in a driving while impaired case by finding the aggravating factor that defendant had a breath alcohol concentration of 0.16 or greater. Contrary to defendant's assertion, *Blakely v. Washington* was not implicated because the level four punishment imposed by the trial court was within the presumptive range so that the trial court did not enhance defendant's sentence even after finding aggravating factors. Further, the court acted within its sentencing authority under N.C.G.S. § 20-179. **State v. Green, 669.**

**Aggravating factors—insufficient notice**—The trial court erred in sentencing defendant in the aggravated range for three charges of discharging a weapon into an occupied property where the State failed to provide defendant proper written notice of its intent to prove aggravating factors for sentencing. The State's letter to defendant regarding plea negotiations did not provide sufficient notice under N.C.G.S. § 15A-1340.16. **State v. Mackey, 116.**

**Aggravated range—murder especially heinous, atrocious, or cruel—single aggravating factor outweighed multiple mitigating factors**—The trial court did not abuse its discretion in a murder case by sentencing defendant within the aggravated range based on its determination that the one stipulated aggravating factor, that the murder was especially heinous, atrocious, or cruel, outweighed multiple mitigating factors. Further, the trial court did not inappropriately consider the fact that the offense was reduced from first-degree murder to second-degree murder. **State v. Gillespie, 746.**

**Aggravating and mitigating factors—presumptive range—no misapprehension of law**—The trial court did not err in a case involving multiple charges by failing to recognize its ability to impose presumptive range sentences where the aggravating and mitigating factors were in equipoise. The trial court's comments about deficiencies in the judgment and conviction form did not reflect any misapprehension of the relevant sentencing law. **State v. Whitted, 522.**

**Form not marked—clerical error—presumptive sentence**—The trial court's failure to mark a box on the judgment and commitment form was mere clerical error where defendant's sentence fell within the presumptive range. **State v. Moore, 551.**

**Habitual felon—jury instructions—defendant's absence—instruction not warranted**—The trial court did not err in a case involving multiple charges by failing to instruct the jury about defendant's absence from the habitual felon phase of the trial. The trial court did not order defendant removed from the courtroom for being disruptive, but rather defendant asked that she be removed. **State v. Whitted, 522.**

**Mitigating factors—presumptive range—no abuse of discretion**—The trial court did not abuse its discretion in refusing defendant's request for a mitigated sentence. Despite uncontested evidence of mitigating circumstances, it was

**SENTENCING—Continued**

within the trial court's discretion not to find any mitigating factors and to sentence defendant in the presumptive range. **State v. Garnett, 537.**

**Mitigating range—plea arrangement**—The Court of Appeals granted defendant's petition for writ of *certiorari* and concluded that the trial court did not fail to comply with the sentencing procedures under N.C.G.S. § 15A-1024. Although defendant characterized the plea arrangement as requiring the trial court to sentence defendant within the mitigated range, this interpretation was not supported by the plain language of the plea arrangement. **State v. Blount, 340.**

**Prior record level—miscalculation harmless error**—The trial court committed harmless error by its calculation of defendant's prior record level. The correct calculation of defendant's prior record points did not affect the determination of his prior record level. **State v. Blount, 340.**

**Restitution—amount—evidence not sufficient**—The trial court erred in the amount of restitution ordered where the amount was supported only by an unverified worksheet. The trial court's award amounted to punishment instead of compensation. **State v. Moore, 551.**

**Restitution—renting out another's property—restitution to owner**—There was no error in an award of restitution to a property owner after defendant was convicted of obtaining property by false pretenses by renting the property as if he owned it. Although defendant's fraudulent representations were made against the renter, the homeowner was harmed as a direct and proximate result. **State v. Moore, 551.**

**Restitution—sufficiency of findings—clerical error**—The trial court erred by ordering defendant to pay \$6,225 in restitution, and the order was vacated and remanded. No evidence was presented in support of the restitution worksheet, and defendant did not stipulate to the specified amount. Further, on remand the clerical error on the restitution worksheet listing Williams as an "aggrieved party" should be changed to list him as the "victim." **State v. Blount, 340.**

**SEXUAL OFFENSES**

**Use of dangerous or deadly weapon—bottle**—The trial court did not commit plain error by instructing the jury to consider whether defendant was guilty of a sexual offense based on the use of a bottle as a dangerous or deadly weapon. **State v. Bonilla, 576.**

**STATUTES OF LIMITATION AND REPOSE**

**Products liability—policy arguments on fairness**—The trial court did not err by granting summary judgment in favor of defendants based on its determination that plaintiffs' products liabilities claims were barred by the six-year statute of repose under N.C.G.S. § 1-50(a)(6). Plaintiffs' policy arguments attacking the general fairness of the statute should be directed to the General Assembly. **Robinson v. Bridgestone/Firestone N. Am. Tire, L.L.C., 310.**

**TAXATION**

**Property valuation—challenge—statute not applicable**—The plain language of N.C.G.S. § 105-325 suggests that the statute was intended to provide a route for a county tax assessor to correct a property valuation and does not pro-

**TAXATION—Continued**

vide an additional remedy to a taxpayer contesting the valuation. **The Villages at Red Bridge, LLC v. Weisner, 604.**

**Property valuation—challenge—writ of mandamus—not available**—The trial court did not err by dismissing plaintiff's petition for a writ of *mandamus* to change a property tax valuation where petitioner did not timely challenge the change in valuation of the property before the county board of equalization and review and did not pursue a second means of redress by paying the taxes and bringing a suit for recovery. *Mandamus* is not intended to rescue parties who have allowed the time for their actions to run. **The Villages at Red Bridge, LLC v. Weisner, 604.**

**TELECOMMUNICATIONS**

**National do-not-call registry—telemarketer**—The trial court did not err by granting defendant's motion for summary judgment on plaintiff's claims that defendant violated certain provisions of the Telemarketing Sales Rule promulgated by the Federal Trade Commission regarding the national “do-not-call” registry. Defendant satisfied its burden of producing sufficient evidence showing that it was not a telemarketer, and plaintiff failed to respond with a forecast of specific facts to show otherwise. **Ward v. Kantar Operations, 448.**

**TRIALS**

**Directed verdict—based upon ruling of prior judge**—The trial court erred by directing a verdict for defendant Sister-2-Sister and dismissing plaintiff's breach of contract claim in an action arising from an employment dispute. The trial court was not free to conclude that the contract was legally unenforceable because of prior rulings by two courts. **Lockett v. Sister-2-Sister Solutions, Inc., 60.**

**Enforceability of contract—ruling by first judge determinative**—A trial court did not err by basing its determination of whether a contract was enforceable on a prior determination by another judge where defendant argued that the second judge had the benefit of hearing evidence and could properly reconsider the conclusion of the first. The first and second judge based their conclusions on the law and the face of the contract, which are not affected by evidence of a person's intent or understanding. Furthermore, one superior court judge may not correct another's errors of law. **Lockett v. Sister-2-Sister Solutions, Inc., 60.**

**Motion to recuse judge—failure to show objective grounds for disqualification**—The trial judge did not err in a first-degree murder case by failing to recuse himself upon defendant's motion. Defendant failed to demonstrate objectively that grounds for disqualification existed. **State v. Oakes, 18.**

**WILLS**

**Personal property—stock—no ademption**—The trial court did not err by dismissing plaintiffs' complaint in a wills action because plaintiffs did not allege facts sufficient to establish that they had a legal right to testator's interest in the Redfields partnership. Testator's gift of his Redfields, Inc. stock remained in testator's estate *in specie* as personal property at the time of his death and, therefore, did not adeem upon the dissolution and termination of Redfields, Inc. **Stanford v. Paris, 173.**

**WITNESSES**

**Denial of qualification as expert—use of force science—intent irrelevant**—The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion to have a witness qualified as an expert in "use of force science" and to give expert opinions on that subject. Although defendant asserted prejudice in terms of the denial of an opportunity for a witness to obviate intent, defendant's intent to kill was irrelevant to a consideration of felony murder. **State v. Oakes, 18.**

**Expert testimony—pharmacology—physiology—knowledge—skill—training—education**—The trial court did not abuse its discretion in a driving while impaired case by allowing a witness to give expert testimony in the areas of pharmacology and physiology. The witness was better informed than the jury about the subject of alcohol as it related to human physiology and pharmacology based on his knowledge, skill, experience, training, and education. **State v. Green, 669.**

**WORKERS' COMPENSATION**

**Amendment to clarify benefit award—temporary total disability benefits—earning full salary wages**—The Industrial Commission did not err in a workers' compensation case by amending the January 2009 award, nor did the full Commission err by affirming the July 2009 award. The amendment of the January award to clarify a deputy commissioner's intentions regarding the benefit awarded was an appropriate exercise of the powers conferred upon the Industrial Commission by N.C.G.S. § 1A-1, Rule 60(b). Further, the Court of Appeals did not need to address whether plaintiff was entitled to late payment penalties because plaintiff was not entitled to temporary total disability benefits so long as he was earning full salary wages. **Ammons v. Goodyear Tire & Rubber Co., 741.**

**Compensable injury—expert testimony—medical causation—not sufficient**—The Industrial Commission erred in a workers' compensation case by concluding that plaintiff's disk herniation injury was caused by a compensable injury. Where plaintiff's medical expert opinion as to medical causation did not rise above the level of mere possibility, the Industrial Commission's findings of fact as to medical causation were not supported by competent evidence. **Gross v. Gene Bennett Co., 349.**

**Foreign award—subrogation lien in North Carolina reduced—no abuse of discretion**—The trial court did not abuse its discretion by applying North Carolina law and reducing the amount of a subrogation lien against a Tennessee workers' compensation award. Remedial rights are determined by the law of the forum. **Cook v. Lowe's Home Centers, Inc, 364.**

**No determination of compensable injury—additional medical treatment—Parsons presumption inapplicable**—The Industrial Commission erred in a workers' compensation case by applying the *Parsons* presumption. Where there was no previous finding of compensability by the Industrial Commission, no previous admission of compensability by the employer, and no agreement as to compensability between the parties, the *Parsons* presumption was not applicable. **Gross v. Gene Bennett Co., 349.**

**WORKERS' COMPENSATION—Continued**

**No entitlement to second opinion evaluation and rating—expiration of statute of limitations**—The Industrial Commission erred in a workers' compensation case by concluding that plaintiff worker was entitled to a second opinion evaluation and rating of the percentage of permanent partial disability of plaintiff's left ankle resulting from a compensable work injury on 18 January 2003. The expiration of time in the statute of limitations under N.C.G.S. § 97-25.1 barred the award. **Busque v. Mid-Am. Apartment Communities**, 696.

**Reflex sympathetic dystrophy—chronic region pain syndrome—failure to show aggravation of pre-existing injury**—The Industrial Commission did not err in a workers' compensation case by finding that plaintiff worker failed to establish that she has reflex sympathetic dystrophy (RSD)/chronic region pain syndrome and by determining that the 18 January 2003 fall did not materially aggravate her pre-existing RSD. **Busque v. Mid-Am. Apartment Communities**, 696.

**Settlement agreement—required language omitted—not enforceable**—A workers' compensation settlement agreement did not comply with the Industrial Commission rules where it did not contain explicit language that "no rights other than those arising under the provisions of the Workers' Compensation Act are compromised or released." Even if a resignation and release provision was severable from the agreement as a whole, as defendant contended, the Commission correctly refused to enforce the agreement. **Kee v. Caromont Health, Inc.**, 193.

**Unreasonable defense—attorney fees**—The decision of workers' compensation defendants to litigate plaintiff's complex medical case for three years was unreasonable where defendants denied treatment and compensation, based on self-proclaimed "common sense" in the face of unanimous medical testimony to the contrary. The Industrial Commission's opinion and award denying attorney fees under N.C.G.S. § 97-88.1 was reversed and remanded. **Blalock v. Se. Material**, 228.

**ZONING**

**Conditional use—correctional facility**—The trial court did not err by granting summary judgment for defendants in a case involving a rezoning for a new jail. Plaintiffs pointed to an ordinance provision regarding proximity of correctional facilities to residential properties, but that provision was not applicable. **Sapp v. Yadkin Cnty.**, 430.

**Consistency and policy guidelines—no secrecy or impropriety**—There was no genuine issue of fact regarding any secrecy or impropriety surrounding a rezoning where, regardless of the contents of the Planning Board minutes, the recommendation received at the Planning office by plaintiff Boose contained both a statement of consistency and a discussion indicating that the proposed zoning amendment met the policy guidelines in the ordinance. Moreover, a member of the Planning Board informed the Board of Commissioners of the recommendation and read the statement of consistency. **Sapp v. Yadkin Cnty.**, 430.

**Statement of consistency—supplied to Commissioners—not required to be in minutes**—The Planning Board met the requirements of N.C.G.S. § 153A-341 and a Yadkin County zoning ordinance by providing a written recommendation to the Board of Commissioners addressing zoning consistency. There was nothing in the statutes or ordinance requiring a statement of consistency in the Planning Board minutes. **Sapp v. Yadkin Cnty.**, 430.

